

No. 89-1905-CSX  
Status: GRANTED

Title: Wisconsin Public Intervenor, et al., Petitioners  
v.  
Ralph Mortier, et al.

Docketed:  
June 5, 1990

Court: Supreme Court of Wisconsin

Counsel for petitioner: Dawson, Thomas J.

See also:  
90-382

Counsel for respondent: Kent, Paul, Solicitor General

40 copies ea pet & vols I & II of appd

Entry	Date	Note	Proceedings and Orders
1	Jun 5 1990	G	Petition for writ of certiorari filed.
2	Jun 5 1990		Appendix of petitioner filed.
3	Jul 5 1990		Brief of respondents Ralph Mortier, et al. in opposition filed.
4	Jul 11 1990		DISTRIBUTED. September 24, 1990
5	Aug 15 1990	X	Supplemental brief of respondents Ralph Mortier, et al. filed.
6	Oct 1 1990	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
7	Dec 19 1990		REDISTRIBUTED. January 11, 1991
8	Dec 19 1990	X	Brief amicus curiae of United States filed.
9	Jan 14 1991		Petition GRANTED.
10	Jan 28 1991	G	Motion of petitioners to dispense with printing the joint appendix filed.
11	Feb 19 1991		Motion of petitioners to dispense with printing the joint appendix GRANTED.
17	Feb 26 1991		Record filed.
		*	Certified copy of Joint Brief on appeal and Supplemental Appendix received.
12	Feb 27 1991		SET FOR ARGUMENT WEDNESDAY, APRIL 24, 1991. (2ND CASE)
13	Feb 28 1991		Brief amicus curiae of National Institute of Municipal Law Officers filed.
14	Feb 28 1991		Brief amici curiae of Village of Milford, Michigan, et al. filed.
15	Feb 28 1991		Brief of petitioners WI Public Intervenor, et al. filed.
18	Feb 28 1991		Brief amicus curiae of United States filed.
19	Feb 28 1991		Record filed.
		*	Certified copy of original record on appeal received. (Box).
20	Feb 28 1991		Lodging received. (10 copies).
21	Feb 28 1991		Brief amici curiae of Conservation Law Foundation of New England, et al. filed.
22	Feb 28 1991		Brief amici curiae of Hawaii, et al. filed.
23	Mar 7 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Mar 18 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	Mar 18 1991	D	Motion of respondents to permit California to

Entry	Date	Note	Proceedings and Orders
			participate in oral argument as amicus curiae and for divided argument filed.
26	Mar 18 1991		Statement of California in support of motion to participate in oral argument filed.
27	Mar 22 1991		CIRCULATED.
28	Mar 25 1991		Motion of respondents to permit California to participate in oral argument as amicus curiae and for divided argument DENIED.
29	Mar 27 1991	X	Brief amicus curiae of Professional Lawn Care Association of America filed.
30	Mar 28 1991	X	Brief amicus curiae of American Farm Bureau Federation filed.
31	Mar 28 1991	X	Brief amici curiae of American Association of Nurserymen, et al. filed.
32	Mar 28 1991	X	Brief amici curiae of National Pest Control Association, et al. filed.
33	Mar 28 1991	X	Brief of respondents Ralph Mortier, et al. filed.
35	Mar 28 1991	X	Brief amicus curiae of Green Industry Council filed.
34	Mar 29 1991		Brief amici curiae of California, et al. filed.
36	Mar 29 1991	X	Brief amicus curiae of Washington Legal Foundation filed.
37	Apr 17 1991	X	Reply brief of petitioners WI Pub Intervenor, et al. filed.
38	Apr 24 1991		ARGUED.



①  
89-1905

Supreme Court, U.S.

FILED

JUN 5 1990

JOSEPH F. SPANIOL, JR.  
CLERK

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

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WISCONSIN PUBLIC INTERVENOR, and TOWN OF  
CASEY,

Petitioners,

v.

RALPH MORTIER and  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF WISCONSIN

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## QUESTIONS PRESENTED

1. Under the Supremacy Clause of the United States Constitution, is the authority of local units of government to enact ordinances in the exercise of their police powers to protect their citizens and environments from hazards of chemical pesticides pre-empted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1980)?

2. Where the Congress in FIFRA expressly allows states to regulate pesticides, may FIFRA, consistent with fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution, be interpreted to deprive states of their authority to delegate to local governments the task of regulating pesticides for protecting the health, safety, and welfare of their citizens?

## LIST OF PARTIES

The parties to these proceedings are the same as those to the proceedings below. The petitioners (original defendants) are the State of Wisconsin Public Intervenor and Town of Casey, Wisconsin, Imbert M. Eslinger, Louis N. Place, Roland K. Colby. The respondents (original plaintiffs) are Ralph Mortier and Wisconsin Forestry/Rights-of-Way/Turf Coalition.

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# OPINIONS BELOW

The decision of the Wisconsin Supreme Court in this case is reported as Mortier v. Town of Casey, 154 Wis. 2d 18, 452 N.W.2d 555 (1990) (I App. A).

The decision of the Washburn County, Wisconsin Circuit Court in Ralph Mortier, et al. v. Town of Casey, et al., is in 1) the PARTIAL TRANSCRIPT -- FINDINGS BY THE COURT MOTION HEARING, and 2) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, Case No. 86-CV-134 (Filed June 16, 1988) (II App. B).

# JURISDICTION

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a) (Supp. 1990).

Here a final judgment was entered by the Wisconsin Supreme Court, the highest court in the State of Wisconsin, by opinion filed March 12, 1990, on the above-captioned matter. That judgment voided a local ordinance on the ground that that ordinance



was pre-empted by federal law (FIFRA), and therefore was repugnant to the Supremacy Clause of the United States Constitution.

The controlling question here arises under art. VI, clause 2, of the United States Constitution, the Supremacy Clause, which provided that all laws of the United States made pursuant to the Constitution are "the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding."

Mortier v. Town of Casey, 154 Wis. 2d 18, 21, 452 N.W.2d 555, 556 (1990). The United States Supreme Court may grant this petition for writ of certiorari under 28 U.S.C. § 1257(a):

Final judgments or decrees rendered by the highest court of a state . . . may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn into question on the ground that it is repugnant to the Constitution, . . . or laws of the United States . . . .

A local ordinance is deemed a state statute for purposes of invoking the jurisdiction of the United States Supreme

Court. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985). The Court may review the validity of a local ordinance which was assailed as unconstitutional by final judgment or decree of the highest state court in which a decision could be had. Id.

#### CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

##### Constitutional Provisions

##### Article VI, Clause 2 Supremacy Clause

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

##### The Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutory Provisions

Federal Insecticide, Fungicide and  
Rodenticide Act (FIFRA),

7 U.S.C. §§ 136(aa), 136v, 136t(b) (1980).

7 U.S.C. § 136(aa):

**State.**--The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

7 U.S.C. § 136v:

**Authority of States**

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

(c)(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied,

disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State.

(2) A registration issued by a State under this subsection shall not be effective for more than ninety days if disapproved by the Administrator within that period. Prior to disapproval, the Administrator shall, except as provided in paragraph (3) of this subsection, advise the State of the Administrator's intention to disapprove and the reasons therefor, and provide the State time to respond. The Administrator shall not prohibit or disapprove a registration issued by a State under this subsection (A) on the basis of lack of essentiality of a pesticide or (B) except as provided in paragraph (3) of this subsection, if its composition and use patterns are similar to those of a federally registered pesticide.

(3) In no instance may a State issue a registration for a food or feed use unless there exists a tolerance or exemption under the Federal Food, Drug, and Cosmetic Act that permits the residues of the pesticide on the food or feed. If the Administrator determines that a registration issued by a State is



inconsistent with the Federal Food, Drug, and Cosmetic Act, or the use of, a pesticide under a registration issued by a State constitutes an imminent hazard, the Administrator may immediately disapprove the registration.

(4) If the Administrator finds, in accordance with standards set forth in regulations issued under section 136w of this title, that a State is not capable of exercising adequate controls to assure that State registration under this section will be in accord with the purposes of this subchapter or has failed to exercise adequate controls, the Administrator may suspend the authority of the State to register pesticides until such time as the Administrator is satisfied that the State can and will exercise adequate controls. Prior to any such suspension, the Administrator shall advise the State of the Administrator's intention to suspend and the reasons therefor and provide the State time to respond.

7 U.S.C. § 136t(b):

(b) Cooperation.--The Administrator shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of

this subchapter, and in securing uniformity of regulations.

### Ordinances

Town of Casey, Washburn County, Wisconsin Ordinance No. 85-1 (1985) (II App. C).

### STATEMENT OF THE CASE

This petition for writ of certiorari to the Wisconsin Supreme Court is based on that court's affirmance of a Washburn County, Wisconsin, Circuit (trial) Court decision and order (II App. B) declaring Town of Casey, Washburn County, Wisconsin, Ordinance 85-1 (II App. C), "void, invalid and of no effect."

The ordinance requires a permit from the town prior to application of pesticides to public lands, private lands subject to public use, and to aerial application of pesticides in the town. Ord. § 1.2. Under the ordinance, permit decisions are to be made after applicants submit adequate information upon which intelligent decisions

can be made. Ord. § 1.3. Hearing rights are provided. Ord. § 1.3(4) and (5). A nominal application fee is required. Ord. § 1.3(6). And public notice of pesticide applications through placarding is required. Ord. § 1.3(7). Each violation of the ordinance carries "a forfeiture of up to \$5,000.00." Ord. § 2.

Plaintiffs-respondents (hereafter plaintiffs) challenged the validity of the ordinance in the Washburn County Circuit Court, Case No. 86-CV-134, naming the Town of Casey and named town board members as defendants. The Wisconsin Public Intervenor, acting pursuant to Wis. Stats. §§ 165.07 and 165.075, was admitted by the court on motion and without objection as a party defendant.

By amended motion dated December 1, 1986, plaintiffs moved for summary judgment alleging the town's ordinance was invalid on the grounds it was pre-empted by federal and

state law. No other grounds were alleged or briefed. The reasonableness of the ordinance, or any of its parts, was not contested in the motion.

The Washburn Circuit Court granted plaintiffs' motion and declared void the town's ordinance, and impliedly all others like it, as pre-empted by both state and federal laws (II App. B).

The order, supported by findings of fact and conclusions of law by the Washburn County Circuit Court, enjoined the Town of Casey and town officials from enforcing Ordinance 85-1. The grounds in support of the order were that: the ordinance was pre-empted by federal law through FIFRA, 7 U.S.C. § 136-136y (1980); Congress intended to pre-empt the regulation of pesticides by local governments; local pesticide regulation is pre-empted by state law; and the ordinance conflicts with federal and state laws and regulations.

Appeal was made to the Wisconsin Court of Appeals. The Wisconsin Supreme Court accepted the case on bypass of the court of appeals pursuant to the joint petition of all parties. Mortier, 154 Wis. 2d at 20 n.2, 452 N.W. 2d at 555 n.2. A divided Wisconsin Supreme Court affirmed the order of the Washburn County Circuit Court exclusively on the federal pre-emption question. Id.

#### REASONS FOR GRANTING THE WRIT

##### I. THE WISCONSIN SUPREME COURT'S DECISION ON THE FEDERAL QUESTION CONFLICTS WITH OTHER STATE AND FEDERAL COURT DECISIONS, AND SHOULD BE SETTLED BY THIS COURT.

The present case meets the Supreme Court Rule 10 criteria for review on writ of certiorari. The Wisconsin Supreme Court decision on the federal pre-emption question presented here conflicts with the state court of last resort decisions in People ex rel. Deukmejian v. County of Mendocino, 36

Cal. 3d 476, 683 P.2d 1150 (1984), and Central Maine Power Company v. Town of Lebanon, 571 A.2d 1189 (Me. 1990). The Maine and California decisions are in conflict with the Wisconsin Supreme Court decision and the federal court decision in Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109 (D. Md. 1986), aff'd without opinion, 822 F.2d 55 (4th Cir. 1987). Two other federal district court decisions on the same federal issue are in conflict and are on appeal in the federal circuit courts: COPARR Ltd., et al. v. City of Boulder, No. 87-M-1865 (D. Col. Oct. 3, 1989) (II App. D), appeal docketed, No. 89-1341 (10th Cir., Nov. 1, 1989); Professional Lawn Care Ass'n v. Village of Milford, No. 89-1439 (E.D. Mich., Aug. 24, 1989) (II App. E), appeal filed No. 89-2141 (6th Cir. to be argued June 14, 1990). No matter the outcome of these cases, there will remain conflict in the case law at least between



state courts and state and federal courts on the federal issue. The federal issue will not be settled until this Court does it.

II. SUPREMACY CLAUSE  
JURISPRUDENCE IS IN NEED OF  
A WORKABLE RULE OF STATUTORY  
CONSTRUCTION TO DISCERN  
CLEAR CONGRESSIONAL INTENT  
TO PRE-EMPT STATE DELEGATION  
OF AUTHORITY TO LOCAL  
GOVERNMENTS.

- A. The Wisconsin Supreme Court Did Not Properly Apply The Governing Rule That The Congressional Intent To Pre-empt The States Or Local Governments Must Be "Clear and Manifest."

"[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 713.

The fundamental rule in pre-emption cases is "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v.

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This rule did not work in this case.

The Wisconsin Supreme Court majority found that the words in the federal act are unclear on the issue of local pre-emption. Mortier, 154 Wis. 2d at 25, 452 N.W.2d at 557-58. It also recognized that the Congress fervently debated but failed to expressly pre-empt local governments from regulating pesticides. Id. at 25-28, 452 N.W.2d at 558-59. See also id. at 39-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting). Yet, as did the Maryland federal district court, the Wisconsin court still managed to derive a "clear" intent to pre-empt from a faulty pre-emption analysis,<sup>1</sup> and from statutory language and

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<sup>1</sup>The Wisconsin court cites at 154 Wis. 2d at 31-32, 452 N.W.2d at 560-61, in support of its holding the following passage from Maryland Pest Control, 646 F. Supp. at 113:

(continued...)



legislative history on which numerous courts and justices differ.

In the face of express permission of the Congress to the states to regulate pesticide use, the Wisconsin court resorted to statutory language and legislative

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<sup>1</sup>(...continued)

Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between the two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation.

(Emphasis added). The clear error in this analytical approach is that the issue in federal pre-emption cases is not, as the district and Wisconsin court couched it, whether "the legislation as finally enacted did not include the proposed language . . . which would have authorized local pesticide regulation." Absent clear pre-emption, local governments were already authorized to regulate in the field. The rule not applied by these courts remains whether the intent to pre-empt authority already possessed by states and local governments clearly was pre-empted. Hillsborough, 471 U.S. at 715.

history to derive inferences of intent to pre-empt local governments.<sup>2</sup>

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<sup>2</sup>Statutory language in the federal act and legislative history equally support opposite inferences that Congress did not intend to pre-empt local governments from regulating pesticides.

7 U.S.C. sec. 136v(b) contains an express preemption provision which prohibits states from enacting labeling laws. It is obvious from this subsection that where the full Congress desired preemption, the law expressly provided for it. Although sub. (b) only expressly prohibits states from dealing with labeling, it impliedly includes preemption of local governmental units in this area also. Any other interpretation would create an absurd result. . . .

Congressional intent to allow local governments to take action in this area is also fairly implied from the express language of FIFRA sec. 22(b) [7 U.S.C. sec. 136t (b)]. This section instructs the EPA administrator to cooperate with any agency of any political subdivision, i.e. city, village town, of a state to secure uniformity of regulations. These instructions would be meaningless if local governments were not perceived as having the authority to adopt regulations in the first

(continued...)

An important fact discounted by the Wisconsin majority was that congressional committees and legislators confronted head-on the policy question whether local governments should be pre-empted from regulating pesticides. In the end, the pre-emption proponents failed to obtain an express provision or other amendatory language in the law to clearly limit or qualify the authority possessed by municipalities to act in the field. See Mortier, 154 Wis. 2d at 41-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting), 154 Wis. 2d at 49, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

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<sup>2</sup>(...continued)

instance. Obviously, the full Congress contemplated there would be the authority in local governments to adopt pesticide laws for which the goal of cooperative uniformity would be sought.

Mortier, 154 Wis. 2d at 48-49, 452 N.W.2d at 568 (Steinmetz, J., dissenting) (footnotes omitted). See also People ex rel. Deukmejian v. Mendocino County, 683 P.2d at 1158-1161.

Instead, the court relied heavily on separate Congressional committee interpretations of bills that preceded the Conference Committee version ultimately adopted by the full Congress that admittedly "did not consider the issue of local regulation of pesticides." Mortier, 154 Wis. 2d at 559, 452 N.W.2d at 559. "Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring). "Although individual committee recommendations may be persuasive, they do not dictate what the intent of the law is when it is adopted by the full Congress. That Congress debated the issue at great length without providing clear indications of preemption leads to the conclusion that no federal preemption was intended."



Mortier, 154 Wis. 2d at 49, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

Especially where the rights of the states to delegate to their local governments the authority to exercise the police power to protect citizen safety is at stake, a judicial rule defining what is required to meet the "clear and manifest purpose" test is needed.

There is a need for an explicit ruling from this Court akin to the implied holding in the California and Maine Supreme Court cases and the dissents in the Wisconsin case to the effect that where the Congress expressly grants authority to the states to act in a given field, where Congress clearly addresses and debates the issue of whether it should pre-empt the states or local governments from regulating in a given field, and where the Congress then proceeds to enact a law without expressly pre-empting them, pre-emption should not be implied from

an inconclusive legislative history. In such cases, pre-emption is not the "clear and manifest purpose of the Congress." Such a rule of statutory interpretation would be "consistent with the historical view of state sovereignty and the state's freedom to distribute regulatory power between itself and its political subdivisions," COPARR, slip op. at 5 (II App. D at 13); People ex rel. Deukmejian v. Mendocino County, 683 P.2d at 1161; would bring some much needed clarity to the law, and would help reduce the spectre of litigation in pesticide pre-emption and other pre-emption cases.

B. Under the Supremacy Clause Analysis, Where The Congress Expressly Allows States To Retain Their Authority To Regulate In A Particular Field, The Contrary Intent To Pre-empt The States From Delegating Their Authority Within That Field To Their Local Governments Should Be Equally Clear.

Under the Supremacy Clause analysis, states retain their sovereignty except where

a federal law expresses to the contrary a "clear and manifest purpose of Congress," Rice v. Santa Fe Elevator Corp., 331 U.S. at 230; Hillsborough, 471 U.S. at 715. The states' authority includes the prerogative to choose the means by which they exercise that authority. In turn, this includes the right to delegate regulatory authority to local governments. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 575 (1985) (Powell, J., dissenting).

The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them. E.g., The Federalist No. 17, p107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961).

Garcia at 574 n.18 (Powell, J., dissenting).

The Wisconsin decision, and others like it, infer a congressional intent to reach into the inner workings of the states to overturn state choices to act through their

local governments even where the court admits, "[b]ecause it is not clear that the statutory language alone evinces congress' manifest intent to deprive political subdivisions of authority to regulate pesticides, it [the statute] is ambiguous." Mortier, 154 Wis. 2d at 25, 452 N.W.2d at 557-58. Still, congressional intent to preempt local governments from exercising their delegated authority was derived from a muddy legislative history on which no less than four other courts have reached conflicting interpretations. Id. at 39, 452 N.W.2d at 564 (Abrahamson, J., dissenting). As a result, no longer is the question in pre-emption cases whether a federal law clearly pre-empts the states along with their local governments from acting in a field, e.g., see Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. at 712; Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Now it is whether federal laws,

even where they expressly allow the states to act, may be discerned to have actually reached into the states to their local governments to pre-empt the latter without the "clear and manifest purpose of Congress" that is traditionally required. Moreover, the split in decisions developing throughout the country on local pre-emption is sending conflicting messages about "the federal-state balance embodied in the Supremacy Clause jurisprudence" that this Court has sought to resolve. Hillsborough at 717; Garcia.

Where the Congress with one hand expressly permits the states to act in a particular field, the "clear and manifest purpose" test behind Supremacy Clause jurisprudence should require that the intent to take back that authority with the other hand be equally clear. Anything less results in the confusion on the issue that now reigns in the nation's courts.

III. IF LEFT INTACT, THE WISCONSIN SUPREME COURT DECISION FORCES THE ISSUE WHETHER, UNDER FUNDAMENTAL PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT, FIFRA MAY BE INTERPRETED TO PREVENT THE STATES FROM DELEGATING AUTHORITY WITHIN THEIR OWN GOVERNMENTAL STRUCTURES.

The issue addressed by the Wisconsin Supreme Court was whether in FIFRA, the Congress intended to pre-empt local governments from regulating pesticides.

The Wisconsin Supreme Court held that by expressly not pre-empting state regulation of pesticides under FIFRA § 24, 7 U.S.C. § 136v, Congress impliedly denied permission to the states to delegate that authority to their local governments. In so doing, the court presumed that as Congress allowed the states to continue exercising their authority to regulate in the field of pesticide use, Congress at the same time may and did retain control as to how the states may exercise this retained power.



The Wisconsin Supreme Court decision thus gives rise to the constitutional issue whether by specifically pre-empting the states from delegating to their local governments the power to regulate pesticides, Congress has impermissibly intruded into so fundamental a right and function of the states as to violate fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution.

Although it was the view of four dissenting Justices of this Court in Garcia 469 U.S. at 560, that the Court's "decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause," 469 U.S. at 560 (Powell, J., with whom the Chief Justice, Rehnquist, J., and O'Connor, J., joined, dissenting), even the majority of the Court observed looking beyond that case: "If there are to be limits on the Federal

Government's power to interfere with state functions--as undoubtedly there are--we must look elsewhere to find them." 469 U.S. at 547. The Court may be confronted with the need to find one of those limits where, as in this case, FIFRA cannot be reconciled with the states' right to delegate their police powers to their subdivisions.

Although the Court in Garcia rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" 469 U.S. at 546-47, the functions examined there did not go to the heart of state governmental structure or the states' prerogatives of how to delegate the exercise of power within that structure. This case does. And regardless of the manner or standard by which the Court might revisit this issue within the factual



context of this case, there is no more fundamental function of state government that deserves protection from federal intrusion than assigning duties and delegating police power authority to state subdivisions and local governments. Garcia at 575 (Powell, J., dissenting, discussion accompanying n.18).

As in all the other cases decided and pending on the federal pre-emption question presented here, there is no "intimation that the State of Wisconsin or its political subdivisions lack the police power to enact pesticide regulations." Mortier, 154 Wis. 2d at 21, 452 N.W.2d at 556.

There are many governmental structures and means available to the states to carry out legitimate state policies and objectives, not the least of which is the protection of public safety, health, and the environment from toxic pesticide chemicals. See discussion starting at 37, infra. While

some states may choose to assign state level agencies this task, others may find it more desirable to assign it to their local or regional subdivisions. States may make this choice for various reasons including considerations of costs, existing governmental structures already carrying out similar functions, and political acceptability. No one knows more about these factors than state and local elected or appointed officials. For example, suppose a state were to choose to exercise its retained authority to regulate pesticide use by delegating exclusive authority or duties to counties to carry out state policies, standards or programs. Under the Wisconsin Supreme Court holding, that option no longer appears to be available. Because FIFRA has been interpreted to have preempted local governments from regulating pesticides, the states necessarily have been deprived the option of assigning pesticide

regulatory responsibilities to their local governments. This occurs, ironically, under a federal law that expressly allows, as the Wisconsin court held, states to continue regulating pesticides.

The Wisconsin Supreme Court decision brings us perilously close to the fundamental constitutional issue whether the Congress may, consistent with fundamental principles of federalism embodied in the Tenth Amendment, tell the states how they may delegate authority within their own governmental structures. This issue could have been avoided had the Wisconsin Supreme Court abided by "the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.'" U.S. v. Security Indus. Bank, 459 U.S. 70, 78 (1982); citing Lorillard v. Pons, 434 U.S.

575, 577 (1978); quoting Crowell v. Benson, 285 U.S. 22, 62 (1932).

The constitutional issue still can and should be avoided by interpreting FIFRA in a manner that is consistent, and not on a collision course, with fundamental principles of federalism.

IV. THE WISCONSIN AND MARYLAND DECISIONS RESULT IN COMPLETELY CONTRARY FEDERAL MESSAGES TO THE STATES AND LOCAL GOVERNMENTS ON PROTECTION OF HUMAN HEALTH AND GROUNDWATER SUPPLIES FROM PESTICIDE CONTAMINATION.

As a result of the Wisconsin and Maryland court decisions pre-empting local governments from regulating pesticide use, states and local governments are getting diametrically opposed messages from Congress and the federal government on protection of groundwater from pesticides. Such inconsistency should have been taken into account and avoided under the judicial rule of statutory construction, consistent with

the Supremacy Clause and Tenth Amendment analyses, that "where two statutes are 'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) (emphasis added); citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-134 (1974); quoting Morton v. Mancari, 417 U.S. 535, 551 (1974).

On the one hand the Wisconsin court decision predictably will be interpreted to mean that under FIFRA local governments may not protect the health, safety and welfare of their citizens from pesticides, even where the object of the regulation is to protect from pesticide contamination groundwater supplies that serve the drinking water, domestic use and environmental needs of affected communities.

On the other, the federal government has sent strong messages to the states and local governments that they, not the federal government, must take the lead role in protecting local groundwater supplies from pesticides. FIFRA itself, although not mentioning groundwater specifically, implies that local governments are authorized to adopt pesticide regulatory laws, such as to protect local ground and drinking water supplies, for which the goal of cooperative uniformity is to be sought. 7 U.S.C. § 136t(b). See n.2 at 23. More specifically, the Safe Drinking Water Act Amendments of 1986 require the states to develop programs "to protect wellhead areas within their jurisdiction from contaminants which may have any adverse effect on the health of persons." 42 U.S.C. § 300h-7(a) (Supp. 1990). The programs are required "to specify the duties of . . . local governmental entities, and public water



supply systems," § 300h-7(a)(1), and must contain, among other things, "implementation of control measures . . . to protect the water supply within wellhead protection areas from such contaminants." § 300h-7(a)(4). Local governments are hardly in a position now to implement zoning or other regulatory control measures to protect groundwater in wellhead protection areas from pesticides under the recent ruling by the Wisconsin Supreme Court.

This is particularly disturbing given the deeply rooted interests of the states and local governments in protecting their citizens' safety, Hillsborough, 471 U.S. at 719; Brown v. Hotel Employees, 468 U.S. 491, 502 (1984), from toxic pesticides.

Pesticides are chemicals or biological substances used to destroy or control weeds or unwanted plants, insects, fungi, rodents, bacteria, and other pests. Pesticides protect our food crops, non-food crops, ourselves, our homes, our pets and livestock. Pesticides are a mixed blessing: they contribute

significantly to agricultural productivity and to improved public health through the control of disease-carrying pests, but they can adversely affect people, non-target organisms such as fish and wildlife, and the environment. Because pesticides are designed to kill and control living organisms, exposure to them can be hazardous. Some pesticides exhibit evidence of causing chronic health effects such as cancer or birth defects. Some pesticides persist in the environment over long periods of time and accumulate in the tissues of people, animals, and plants.

Pesticides: EPA's Formidable Task to Assess and Regulate Their Risks, United States General Accounting Office at 10 (April 1986). "Pesticide pollution of ground water has recently become a major issue in the United States." Osteen, C., et al., Agricultural Pesticide Use Trends and Policy Issues, United States Department of Agriculture, Agricultural Economic Report No. 622 at 48 (September 1989). "With over 50 percent of the nation's population relying on ground water for their drinking

water source, we cannot underestimate the seriousness of pesticides occurring in ground water." E.P.A. Office of Pesticide Programs, Pesticides In Ground Water Data Base 1988 Interim Report at 1-7 (December, 1988). "In 1987, the U.S. Environmental Protection Agency documented 19 pesticides occurring in ground water from 24 states attributed to agricultural practices." Ibid (citation omitted).

Nielsen and Lee estimated that 1,128 counties had potential pesticide contamination of ground water. Approximately 46 million people use ground water that may be contaminated with pesticides. About 18 million people rely on private wells that are more susceptible to contamination than deeper, regulated public wells. Ground water in 1,437 counties, or about 46 percent of counties in the conterminous States, may be contaminated by pesticides or nitrogen fertilizers... The ground water contamination potential is especially acute in regions of the Corn Belt, Lake States, eastern seaboard, and gulf coast... The EPA is proposing plans that emphasize State management of ground water problems. . . .

Osteen, at 48. Indeed, Wisconsin has taken up the invitation by enacting a comprehensive groundwater law, 1983 Wisconsin Act 410, which in sections 19, 20 and 21 amend local police power statutes "to encourage the protection of groundwater resources." "Since it is reasonable to assume municipalities may act to protect groundwater supplies, it would be an anomaly to find that these same municipalities cannot act to also protect their food supplies, homes, work, and recreational areas from pesticide contamination." Mortier, 154 Wis.2d at 53, 452 N.W.2d at 570 (Steinmetz, J., dissenting).

In Ruckelshaus, the Court found it "entirely possible for the Tucker Act and FIFRA to co-exist." 467 U.S. at 1018. Had the Wisconsin Supreme Court followed the rules governing both the traditional statutory interpretation and Supremacy Clause analyses, the wellhead protection

provisions of the Safe Drinking Water Act that encourage state and local governments to protect groundwater supplies from pesticides would not be in potential conflict with FIFRA.

Federal agencies, acting under their congressionally delegated authority, are sending an equally clear message to state and local governments to protect their groundwater supplies from pesticides.

In 1984 the United States Environmental Protection Agency (EPA) Office of Ground-Water Protection published its Ground-Water Protection Strategy. There, EPA identified pesticides as a significant source of groundwater contamination (Strategy at 13, 15). EPA's strategy for protecting groundwater contemplates states and their local governments taking the lead protection role, with the EPA providing technical and financial support. Strategy at 33-52. "EPA believes that the most effective and broadly

acceptable way to strengthen institutional capability to protect (ground) water is to strengthen State programs." Id. at 35. In turn, state programs include a strong local government role.

Local governments can also play a major role in ground-water protection. They derive their authorities from State environmental statutes or from related, powerful authorities, such as those to protect public health and to control land use. . . .

Strategy at 23 (emphasis added). In its follow-up report specifically dealing with protection of groundwater from pesticides, the EPA more directly enunciated the local role it contemplated as part of the national strategy.

Since pesticides are a potential source of contamination for public water supply wells and critical aquifer protection areas, EPA anticipates that many State and local governments will seek to develop programs that address this source. . . .

. . . .



The Agency recognizes that technical information on practices to reduce these risks is needed to help in the design and implementation of programs addressing pesticide contamination at the State and local levels.

EPA Office of Ground-Water Protection, Protecting Ground Water: Pesticides and Agricultural Practices at 3 (1988) (emphasis added).

"[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." Hillsborough, 471 U.S. at 719, citing Rice, 331 U.S. at 230.

The traditionally "powerful authorities" of local governments to protect their citizens from pesticide contaminated ground and drinking water supplies will be largely eviscerated if local governments are pre-empted from regulating pesticides as part of their groundwater protection schemes. More significantly, the messages being received by local governments from the federal government on protecting groundwater

from pesticides is now inconsistent and confused. This absurd result should have been avoided by interpreting FIFRA consistent with the retention of the states' right to delegate pesticide regulatory authority to their local governments.

#### CONCLUSION

For the foregoing reasons, this Court should grant this petition; issue a writ of certiorari to the Supreme Court of Wisconsin; and it should reverse the decision of the Supreme Court of Wisconsin.

Dated this 5th day of June, 1990.

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89-1905

Supreme Court, Wis.  
FILED  
JUN 5 1989  
JOSEPH F. SPANIOLO  
CLERK

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

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WISCONSIN PUBLIC INTERVENOR, and TOWN OF  
CASEY,

Petitioners,

v.

RALPH MORTIER and  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION,

Respondents.

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APPENDIX VOLUME I

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• • THOMAS J. DAWSON  
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Mortier v. Town of Casey, 154 Wis. 2d 18

Ralph MORTIER and Wisconsin Forestry/Rights-Of-Way/Turf Coalition, Plaintiffs-Respondents,

v.

TOWN OF CASEY, Wisconsin, Imbert M. Eslinger, Louis N. Place, Roland K. Colby and State of Wisconsin Public Intervenor, Defendants-Appellants.

Supreme Court

No. 88-1423. Argued September 7, 1989.  
--Decided March 12, 1990.

(On bypass from court of appeals.)

(Also reported in -- N.W.2d--.)

1. Constitutional Law § 15\*-validity of state law-effect of federal constitution-preemption.

Test for determining whether state law must be invalidated or preempted in light of congressional enactment is to ascertain and give effect to intent of Congress. \*

2. Municipal Corporations § 140\*-ordinances-constitutionality-supremacy clause analysis.

For purposes of supremacy clause, constitutionality of local ordinances is analyzed in same way as that of state laws.

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\*See Callahan's Wisconsin Digest, same topic and section number.

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3. State § 2\*-repugnancy between state and federal laws-preemption-presumptions.

General presumption arising out of federal system of dual sovereignty is that there will be no preemption unless that intent of Congress is clear.

4. Statutes § 211\*-construction-ambiguous legislative intent-resort to history of act.

Where it is not clear that statutory language alone evinces legislative intent, court looks to legislative history to ascertain primary legislative purpose in enacting statute and using particular language.

5. Municipal Corporations § 146\*-ordinances-pesticides-federal preemption.

Town's pesticide ordinance was invalid, where preemptive action of Congress deprived town of its police power to regulate pesticides, as federal act authorized state to enact legislation which would not be preempted but specifically excluded that authorization to be given to any other lower level governmental entities.

\*See Callahan's Wisconsin Digest, same topic and section number.

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ABRAHAMSON, STEINMETZ and BABLITCH, JJ., dissent.

STEINMETZ and BABLITCH, JJ., dissent.

APPEAL from an order of the Circuit Court for Washburn County, DENNIS C. BAILEY, Judge. Affirmed.

For the defendants-appellants there were combined briefs (in court of appeals) by Linda Monroe, Madison, and Thomas J. Dawson, assistant attorney general and oral argument by Linda Monroe and Thomas J. Dawson.

For the plaintiff-respondent there was a brief (in court of appeals) by Paul G. Kent, Richard J. Lewandowski, and DeWitt, Porter, Huggett, Schumacher and Morgan, S.C., Madison and oral argument by Mr. Kent.

Amicus curiae brief was filed by Eugene O. Gehl and Barbara J. Swan, Madison, for Wisconsin Power and Light Company, Northern States Power Company, Wisconsin Public Service



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Supreme Court

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Corporation and Wisconsin Electric Cooperative Association.

HEFFERNAN, CHIEF JUSTICE. The question presented in this appeal from an order for a declaratory judgment of the circuit court for Washburn county is whether the ordinance of the Town of Casey purporting to regulate the use of pesticides in the Town is preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).<sup>1</sup> We conclude that the ordinance is preempted by the federal law, because the legislative history of the enactment in 1972 reveals a clear intent of the congress to preempt all local regulation of the use of pesticides. We affirm the order of the circuit court declaring the Town of

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<sup>1</sup>7 U.S.C., sec. 136 et seq.

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Casey ordinance "void, invalid and of no effect."<sup>2</sup>

The facts are undisputed. The plaintiffs are a coalition of persons who challenge the ordinance on grounds that it is preempted by both federal and state legislation. Mortier, one of the plaintiffs, sought to spray a portion of his own land located in the Town of Casey with a pesticide. He applied for a permit to do so. The permit was granted subject to restrictions mandated by the Town of Casey's ordinance, which precluded aerial spraying and limited the land area which could

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<sup>2</sup>This appeal from the order entered on June 16, 1988, was accepted on bypass of the court of appeals (sec. 809.60, Stats.) pursuant to the joint petition of all parties.

Because we decide the case on the controlling question of federal preemption, we do not address the question of whether the enactments of the Wisconsin legislature also preempt the Town ordinance. The circuit court held that the town ordinance was preempted by both federal and state legislation.

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be sprayed. Mortier and his fellow plaintiffs brought a declaratory judgment action to declare the ordinance invalid on the grounds of preemption.

We start our analysis of preemption recognizing the constitutional basis of the separate sovereignty of the United States and of the state of Wisconsin. The Tenth Amendment to the United States Constitution recognizes that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

There is, however, no intimation in the record that the enactment of FIFRA was not a proper and constitutional exercise of the legislative power of the United States. Nor is there any intimation that the state of Wisconsin or its political subdivisions lack the police power to enact pesticide

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regulations. The controlling question arises under art. VI, clause 2, of the United States Constitution, the supremacy clause, which provides that all laws of the United States made pursuant to the Constitution are "the supreme law of the land . . . any thing in the constitution or laws of any state to the contrary notwithstanding."

This latter portion of the Constitution, at least since 1824, has been held to invalidate any state laws that "interfere with, or are contrary to," federal law. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1,211 (1824), Marshall, C.J.

[1,2]

The test for determining whether the state law must be invalidated or preempted in light of a congressional enactment has been variously stated. The essence of the inquiry is succinctly and simply summarized by Judge

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Kaufman in *New York State Pesticide Coalition, Inc. v. Jorliny*, 874 F.2d 115, 118 (2d Cir., 1989), "[O]ur task is to ascertain the intent of Congress." See also, *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). For purposes of the supremacy clause, the constitutionality of local ordinances is analyzed in the same way as that of state laws. *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 712 (1985); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

[3]

In general, it can be said, however, that the general presumption that arises out of the federal system of dual sovereignty is that there shall be no preemption unless that intent of congress is rather clear. In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the United States Supreme Court stated

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the rule that "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Thus, preemption, the superseding of the sovereign prerogatives of a state, should not be lightly assumed, but should be found only when it is the intention of the congress to assert federal primacy in a particular field.

The clearest declaration of intent is simply a congressional statement appearing in the legislation which asserts federal primacy. One example is referred to in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626-27 (1973): "'The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States....'"<sup>3</sup>

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<sup>3</sup>*City of Burbank* turned on an analysis of the pervasive nature of the scheme of aircraft noise regulation and not on the quoted



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There may also be preemption of state laws or local ordinances where no express preemption appears in the congressional legislation, but the entire statutory context or regulatory terrain impels the conclusion that congress intended to exclude states and local governments from the area of concern. The *City of Burbank* case, *supra*, is illustrative of this type of determination of congressional intent to preempt from the pervasive nature or completeness of the examined congressional scheme.

In the *Burbank* case, there was no express provision for preemption of noise control, but the court, relying upon *Rice v. Santa Fe Elevator Corp.*, *supra* at 230, concluded that there could be a "clear and manifest purpose"

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preemptive statement in respect to airspace. The statement does, however, illustrate an express statement of federal preemption. 411 U.S. at 633.

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of congressional preemption even though no statement of congressional preemption appeared in the legislation. It found that clear and manifest congressional purpose in the "pervasive nature of the scheme of federal regulation of aircraft noise. . . ." 411 U.S. at 633.

Thus, although the congressional intent to preempt may, in some case, only be apparent by implication, the congressional purpose can nevertheless be clear.

It should be noted that the pervasive nature of the federal act in *Burbank* was derived not alone from the words of the act and concomitant federal regulations, but from the legislative history of the anti-noise bill, including statements appearing in committee reports, statements of the Secretary of Commerce, statements of the chairpersons of the affected congressional committees, and the

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statement of the President made contemporaneously with the signing of the bill.<sup>4</sup>

Under the express words of the supremacy clause, state law must give way to contradictory or incompatible provisions of a congressional enactment. The plaintiffs assert that, in practice, that must be the result here, for on its face the Town of Casey ordinance could prohibit completely the use of FIFRA-approved pesticides by FIFRA-approved applicators according to FIFRA-approved label instructions. While, as a matter of law, we do

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<sup>4</sup>The dissent of Justice Rehnquist reaches the opposite conclusion, i.e., that the congressional intent was to allow local regulation. Although they differ in their conclusion as to whether a "clear and manifest purpose" to preempt can be found, the significance of both the majority and the dissent in *Burbank* to the instant case is their reliance on legislative history. In his dissent, Justice Rehnquist acknowledges that implied preemption in a proper case may be based on legislative history.

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not disagree with the plaintiffs' premise, the situation in light of the record is a hypothetical one, for no such complete prohibition is posed by the facts, and we need not address the plaintiffs' assertion in light of our reliance on the legislative history, which we conclude demonstrates a clear and manifest congressional intent to preempt all local regulation.

Thus, there are many paths to determine preemption. The easiest and most forthright, in the absence of an outright statement of federal preemption in the legislation, is simply to start out with the constitutionally directed assumption that, in view of the nature of the federal system, there can be no preemption unless there is an express and unequivocal congressional statement that, in the particular area of legislation, the congressional actions are supreme and state

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laws are invalid. If the presumption is taken literally, anything less than a forthright preemption statement is ambiguous and traditional state powers must be allowed to stand. While this is an attractive and logical option, it is not the law, for almost all preemption opinions of the Supreme Court deal with ambiguities where there is no express preemptive statement in respect to congressional intent.

[4]

While FIFRA does not contain any express preemption language, it does, however, contain language which is indicative of congress' intent to deprive political subdivisions, like the Town of Casey, of authority to regulate pesticides. In sec. 136v, congress authorizes only "states" to regulate pesticides. Then, in sec. 136(aa), the act states that political subdivisions are excluded from the definition

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of "states." See *infra*. Because it is not clear that the statutory language alone evinces congress' manifest intent to deprive political subdivisions of authority to regulate pesticides, it is ambiguous. Accordingly, we look to the legislative history to ascertain the primary congressional purpose in enacting these sections and using this particular language. *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 410-11 (1983); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 634-38 (1973).

The intent of congress-to preempt local, but not state, regulation-becomes abundantly clear when the end product of the congress is considered in light of the progress of the pesticide bill through the congress.<sup>5</sup>

<sup>5</sup>An historical perspective of FIFRA from 1947 to 1983 is afforded by the opinion of *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 990-93 (1984).



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The history of pesticide regulation in this country reflects a struggle between recognizing the important role pesticides play in making the United States a leader in world food production and recognizing the risks that pesticides pose to public health and the environment. With these competing public policies in mind, President Nixon proposed legislation in 1971 to develop a comprehensive regulatory scheme governing the use and sale of pesticides.<sup>6</sup> This proposal served as the basis for the pesticide regulation bill originally introduced as H.R. 4152.<sup>7</sup> The purpose of the proposed bill was "[to provide] for the more complete regulation of pesticides in order to provide for the protection of man and his environment and the enhancement of the

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<sup>6</sup>See U.S. Code Cong. & Admin. News, Vol. 3, p. 4001, 1972.

<sup>7</sup>See H.R. Rep. No. 92-5111, p. 12.

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beauty of the world around him."<sup>8</sup> FIFRA accomplished this goal by establishing a nationwide system for training and certifying pesticide applicators, requiring the registration of pesticides, limiting pesticide use to purposes permitted by law and by making it unlawful to use pesticides in a manner that is inconsistent with the label instructions on the container of the pesticide.

After 17 public hearings and 19 closed business meetings, the House Committee on Agriculture reported H.R. 10729 to the full House. H.R. Rep. No. 92-511, p. 13. This committee rejected a proposal which would have permitted political subdivisions other than states to further regulate pesticides:

The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50

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<sup>8</sup>See U.S. Code Cong. & Admin. News, supra at 3995.

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States and the Federal Government should provide an adequate number of regulatory jurisdictions.

H.R. Rep. No. 92-511, p. 16.

The bill was referred to the Senate Committee on Agriculture and Forestry. The Senate Committee on Agriculture and Forestry concurred with the House Committee on Agriculture's and the House of Representatives' decision to "deprive" political subdivisions of any authority over pesticide regulation. That committee's report states:

The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on

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the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political sub-divisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides. [Emphasis supplied.]

S. Rep. No. 92-838, 92nd Cong. 2nd Sess. reprinted in *U.S. Code Cong. & Admin. News*, Vol. 3, pp. 3993, 4008, 1972.

The Senate Commerce Committee also had jurisdiction over the bill.<sup>9</sup> The Senate Commerce Committee introduced an amendment to the bill which would have given local governments the authority to regulate pesticides.<sup>10</sup> The Senate Committee on Agriculture and Forestry reasserted its

<sup>9</sup>118 Cong. Rec. 32251 (1972).

<sup>10</sup>*U.S. Code Cong. & Admin. News*, *id.* at 4066.

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intention to preempt local pesticide regulation.<sup>11</sup>

The two Senate Committees deliberated for almost two months and were able to arrive at a compromise in the form of a substitute bill.<sup>12</sup> The Senate Commerce Committee's amendment allowing local governments a role in pesticide regulation was excluded in the substitute bill.<sup>13</sup>

Eventually, H.R. 10729 came before the full Senate. The Senate rejected the amendment proposed by the Senate Commerce Committee which would have allowed local governments to regulate pesticides.<sup>14</sup> The Senate passed the compromise version of H.R. 10729 by a vote of

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<sup>11</sup>Id. at 4066.

<sup>12</sup>Id. at 4091.

<sup>13</sup>Id. at 4091

<sup>14</sup>See 118 Cong. Rec. 32258 (1972).

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71-0.<sup>15</sup> Concurring basically with the House version of the bill, in addition, Senator Allen, the Chair of the Subcommittee on Agricultural Research and General Legislation, inserted into the Congressional Record, the following:

[FIFRA] should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides. [Emphasis supplied.]

Id. at 32256.

Finally, members of the Senate and House met in conference to resolve differences between their respective versions of the pesticide legislation. The Conference Committee's explanatory statement reflects that the Committee did not consider the issue

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<sup>15</sup>Id. at 32263.



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of local regulation of pesticides<sup>16</sup> as that had previously been resolved.

The completed act included the language which, coupled with the legislative peregrinations of the pesticide bill, unmistakably demonstrates the intent of congress to preempt local ordinances such as that adopted by the Town of Casey. 7 U.S.C., sec. 136v (1982 ed.) provides in part:

**§ 136v. Authority of States**

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

(c)(1) A State may provide registration for additional uses of federally registered pesticides formulated for

<sup>16</sup>See U.S. Code Cong. & Admin. News, id., at 4130-4135.

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distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State.

Thus, there has been a specific authorization for "states" to regulate the sale or use of pesticides. In effect, this is a declaration of negative preemption, i.e., it is reasonable to conclude that this provision was inserted for the express purpose of negating any possible implied intent to preempt state regulations. From this alone, it is possible to infer that regulation by other governmental entities not protected from preemption by 7 U.S.C., sec. 136v, is preempted.

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Congress left no doubt about what it meant when it referred to a "State." Section 136(aa) provides:

#### (aa) State

The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

This provision in itself is persuasive under the exclusion rule that omitted governmental entities such as the Town of Casey are excluded or deprived of the right to regulate the use of pesticides. It is significant that congress was careful to distinguish between provisions which apply to "states" and provisions which apply to "states or political subdivisions." For example, FIFRA provides in sec. 136t(b) that the EPA shall cooperate with any appropriate agency of any "State or any political subdivision." Moreover, this provision, when coupled with repeated references in the course of the

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legislative committee reports that the decision of both the House and Senate was to "deprive" political subdivisions of states and other local authorities of any authority or jurisdiction over pesticides, leads to the unmistakable conclusion that it was the clearly manifested intent of the congress to preempt any regulation of pesticides by local units of government. While the regulation of pesticides traditionally lies within the police powers of local communities, the federal legislation "deprives" them of that authority.

Moreover, the commentary to federal regulations promulgated pursuant to FIFRA, although after the fact of congressional action, expresses the administrative determination of the EPA that "It is not the intention of the Act or of these regulations to authorize political subdivisions below the



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State level to further regulate pesticides."

40 Fed. Reg. 11700.<sup>17</sup>

We agree with the basic conclusion of the United States District Court in *Maryland Pest Control Assoc. v. Montgomery County*, 646 F. Supp. 109 (D. Md., 1986), aff'd 822 F.2d 55 (4th cir., 1987), when it determined that the posting and notice provisions of a local unit of government in respect to application of pesticides were preempted by FIFRA. In concluding that the local provisions were invalid, the United States District Court,

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<sup>17</sup>*Hillsborough County v. Automated Medical Labs*, 471 U.S. 707 (1985), is a case frequently cited for the proposition that mere pervasiveness of regulation and nothing more may not compel a conclusion of preemption. We refer to the opinion only because it points out that "state laws can be pre-empted by federal regulations as well as by federal statutes." P. 713. As stated above, the commentary is indicative of the EPA's authoritative construction of the congressional intent of FIFRA to exclude pesticide regulation below the state level.

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after examining the same legislative history which we recounted above, stated:

[T]his legislative history could not be more clear. Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized<sup>18</sup> local pesticide

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<sup>18</sup>While the parties seem to think that the term, "authorize," is indicative of sloppy thinking on the part of the District Court (because it is contended that local governments inherently possess that police power authority), that view of the court's language overlooks the fact that, without the language excepting "states" from the effect of the law, states, as well as local government powers, might well be construed to be preempted. Hence, it was appropriate to speak of local government authority. Moreover, the language used in the committee report makes pellucid that it was the will of the committee, eventually ratified by the congress, that local subdivisions of states be "deprived of authority." It was appropriate and perceptive for the United States District Court to refer to the question of whether, despite the nature of federal regulation imposed by FIFRA, localities in addition to states should nevertheless have the authority



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regulation. Principled decision-making and respect for the integrity of the legislative process compel the conclusion that Congress knew and meant what it was doing.

646 F. Supp. at 113.

[5]

Both the plaintiffs and defendants have posited policy reasons why their respective positions should prevail. The plaintiffs assert that the whole question of pesticide regulation is so complex and technical that local governments cannot possibly cope with the ever-changing advances in science and medicine—that only national and state regulation is feasible. The defendant Town, on the other hand, argues that only the localities where the pesticide will be used can be aware of the local conditions and the

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to impose additional regulations. Clearly, the unambiguous intent of the congress was to deprive the local units of government of their usual police power authority.

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hazards that pesticide use can cause in a particular locality. Additionally, it is argued that to find preemption affronts the constitutional prerogatives of states' rights and home rule. All of these positions in the abstract and in reality have merit, but the question posed for this court's resolution is one of law and statutory interpretation: Was there a manifested intent by the congress that there be preemption? Because we conclude there was preemption of local regulation, it is clear that the policymaker—in this case the congress—must be given ultimate deference in its determination of policy, i.e., that it is the policy of the United States Congress to allocate the power to regulate pesticides at a level that stops at the state level. If that policy is less than the optimum, the resolution must be left to the political arena and not to the judiciary. Moreover, if, as we

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find, that preemption was the intent of the Congress, fidelity to our constitutional structure requires that federal supremacy be recognized. We conclude that the circuit court correctly concluded that the preemptive action of the congress deprived the Town of Casey of its police power to regulate pesticides. We affirm the declaration of the circuit court that the Town of Casey's pesticide ordinance is invalid.

By the Court.-Order affirmed.

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SHIRLEY S. ABRAHAMSON, J. (dissenting).

The majority opinion concludes that in enacting the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) Congress divested local government of the power to regulate the use of pesticides for the health and safety of its citizens. Because I conclude that Congress has not demonstrated a clear and manifest purpose to deprive local government of its powers under the Federal Constitution, I dissent.<sup>1</sup>

I.

The fundamental premise of preemption analysis is that absent any showing of "a clear and manifest purpose of Congress" to preempt state and local governmental regulation, the courts will not infer

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<sup>1</sup>I limit my discussion to the federal preemption issue. I conclude, however, that the Town of Casey's Ordinance is not preempted by state law.

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preemption. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The United States Supreme Court has repeatedly expressed its reluctance to infer preemption, characterizing its reluctance as a presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This presumption is even stronger when the state or local governmental regulation relates to health and safety, which the Court has characterized "primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 718 (1985). See also *Rice v. Santa Fe Elevator Corp.*, *supra* 331 U.S. at 230; *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 487-88 (9th Cir. 1984), cert. denied 471 U.S. 1140 (1985).

The Court's reluctance to infer preemption is grounded in its deference to the

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role of states in our federal system. If congressional intent or purpose is ambiguous, courts should be slow to find preemption, "[f]or the state is powerless to remove the ill effects of our decision, while the national government, which has the power, remains free to remove the burden." *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943).

The United States Supreme Court has recognized that Congress may preempt state and local governmental power by express statutory language (sometimes referred to as *express exemption*). *Jones v. Roth Packing Company*, 430 U.S. 519, 525 (1977).

By requiring that the congressional decision to restrict state and local governments be made in a deliberate manner through the exercise of law-making power, the



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Supreme Court attempts to ensure a sound balance between state sovereignty and national interests. Tribe, *Constitutional Law* 480 (1988).

Absent express statutory language, courts must interpret the federal statute to determine whether the challenged state or local action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). State or local action will be an obstacle (1) if Congress dominates the regulatory field by structure or objective and "leaves no room" for supplementary state or local regulation (sometimes referred to as *implied preemption*), or (2) if state or local regulation conflicts with federal law (sometimes referred to as *conflict preemption*). *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); Ray

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*v. Atlantic Richfield*, 435 U.S. 151, 158 2(1978); *Malone v. White Motors*, 435 U.S. 497, 504 (1977).<sup>2</sup>

II.

I conclude that under each of these tests FIFRA does not preempt the Town of Casey's ordinance.

FIFRA contains no express language preempting local regulation, nor does it

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<sup>2</sup>"The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986) (Citations omitted.)

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exclude political subdivisions from the definition of states, as the majority claims. Nor is the statute "ambiguous" regarding preemption-it is simply silent. See majority op. p. 25.

Furthermore, there is no indication in FIFRA that Congress considered pesticide regulation to be an exclusive federal interest or that Congress occupied the field. Labeling of pesticides is under the exclusive control of the Environmental Protection Agency, but FIFRA explicitly authorizes states to regulate pesticides under federal guidelines. The 1972 Amendments provide that "a state may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. sec. 136v(a). Congress thus expressly provided that the states and

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the federal government share control over the use of pesticides for the safety of citizens and their environment.

Nothing in FIFRA expressly prohibits a state from delegating its power under FIFRA to municipalities. Congress apparently viewed the local governments as having some role. Under sec. 136t, the Environmental Protection Agency must cooperate with any state or "any political subdivision thereof, in carrying out the provisions of this Act, and in securing uniformity of regulations."

I cannot find in the structure or objective of the Act that Congress has dominated the regulatory field and left no room for supplementary local regulation.

Finally, the Town of Casey ordinance does not conflict with FIFRA. I therefore conclude that there is no conflict preemption.



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III.

As the foregoing discussion indicates, Congress was silent regarding local governments' authority to regulate pesticides and Congressional intent to preempt local governmental regulation. Congress did not occupy the regulatory field, and no conflict exists between FIFRA and the Town of Casey ordinance. Nevertheless, the majority opinion concludes that Congress expressly preempts local governmental regulation of pesticides. The majority opinion reaches its conclusion that Congress's silence amounts to an express Congressional intent to preempt local action by examining the legislative history surrounding the passage of FIFRA in conjunction with sec. 136v. Majority op. pp.--.

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While I have doubts about the methodological approach the majority employs,<sup>3</sup> I need not reach that issue because

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<sup>3</sup>The majority opinion does not fit into the traditional preemption analysis of express preemption, implied preemption, or conflict preemption even when you accept that the three categories are not analytically airtight. Tribe, *Constitutional Law*, 481, n. 14 (1988).

The majority opinion apparently attempts to find express preemptive intent not in the text of the statute but in legislative history. It defends its reliance on legislative history to determine express Congressional intent about preemption (majority op. at--) by concluding that secs. 136v authorizing states to regulate the sale or use of any federally registered pesticide raises a negative implication that Congress intended to preempt local governmental regulation of pesticides. The majority opinion is saying that Congress's express authorization to the states raises a question about Congress's intent to proscribe local action. Building on this perceived "ambiguity," the majority opinion examines legislative history to determine Congress's express intent to preempt local action.

Neither case the majority opinion cites supports its approach that legislative history may serve as the sole basis for finding express intent about preemption or the clear



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and manifest purpose of Congress required for preemption of state or local regulations.

The majority opinion first relies on *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1972). In that case the Supreme Court determined that the pervasive nature of federal regulation of airspace precluded imposing local noise controls on airports. After reaching this conclusion, Justice Douglas, writing for the majority, referred to legislative history during passage of the bill, stating that the bill would not change the preemption rule existing under previous statutes and to statements of Senators and the President asserting that federal regulation preempted state regulation. These references were apparently placed in the opinion to bolster a conclusion of the pervasiveness of the federal act that the Court had already reached (implied preemption).

In dissent Justice Rehnquist looked at earlier congressional enactments, not legislative history during passage of the bill, to determine whether Congress had previously preempted the field from state or local regulation of the type that the City of Burbank had enacted. The majority and dissent apparently did not disagree about the legislative history during passage. They disagreed about the pervasiveness of the new federal act, about whether prior acts were pervasive also and whether Congress impliedly preempted local action.

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I do not read *Burbank* as endorsing the majority opinion's claim that a court can examine conflicting legislative history to determine Congress's express intent to preempt local action. The majority opinion does not rest on the premise that FIFRA is pervasive and thus occupies the field (implied preemption).

In *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406 (1983), the question was whether the federal statute required transfers of title to aircraft to be in writing and recorded with the FAA to be valid against innocent third parties. Philko was entitled to the plane if the federal statute governed all title transactions and supplanted local transfer law. Shacket would win if state law could govern transactions where no written transfer of title existed. The Court examined the legislative history not to determine congressional intent about preemption but to help define the statutory language relating to conveyances, thereby determining the scope of the federal legislation and whether the state law conflicted with the federal law. Once the Court clarified the federal statute's use of the term conveyance, the Court concluded that the state law conflicted with federal law and was preempted (conflict preemption).

Using the *Philko* approach, the majority opinion should look for legislative history illuminating the meaning of the word State. It does not. It cannot because the definition of state is clear. Instead, the majority looks to

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the legislative history upon which the majority relies does not demonstrate with the requisite degree of clarity that Congress expressly or impliedly intended to preempt local regulation.

Four other courts have examined the legislative history of FIFRA that the majority contends is "abundantly clear," majority op. p. 25, and reached conflicting interpretations of Congressional intent. One court concluded that the legislative history of FIFRA demonstrates that Congress intended to preempt local regulation. *Maryland Pest Control*

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legislative history to determine Congressional express intent about preemption.

The *Philko* case does not stand for the rule that the Court will examine legislative history to determine Congress's express intent about preemption. The *Philko* case is a typical case in which the Court examines legislative history to determine the meaning of ambiguous language in the statute. The *Philko* court then determined there was preemption because of conflict.

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*Assoc. v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd* without opinion 822 F.2d 55 (4th Cir. 1987). Three courts concluded that the legislative history demonstrates that Congress did not intend to preempt local regulation of pesticides. *People ex rel. Deukmejian v. County of Mendocino*, 683 P. 2d 1150 (Cal. 1980); *Central Main Power Co. v. Lebanon* (Maine Supreme Judicial Court, March 6, 1990); and *Coparr, Ltd. and Caranci v. Boulder*, No. 87-M-1865 (Dist. Ct. Denver, Colo. October 3, 1989). Put in their best light, these cases suggest that the legislative history surrounding the enactment of FIFRA is ambiguous: courts reading the same documents have reached different conclusions. Viewed in their worst light, the results reached in the cases confirm Harold Leventhal's observation that statutory



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interpretation is akin to "looking over a crowd and picking out your friends."<sup>4</sup> As

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<sup>4</sup>Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Judge Abner Mikva, a former member of Congress, has also warned against wholesale acceptance of legislative history. Committee reports are central pieces of evidence when attempting to determine legislative intent behind a particular legislative act. But "[c]ommittee reports are too frequently used for political horse-trading and individual ego trips . . . ." *Reading and Writing Statutes*, 48 U. Pitt. L. Rev. 627, 631 (1987). Judge Mikva directs our attention to the minutiae which cloud any attempt to divine the intent of "535 prima donnas":

Even the nuts and bolts of the legislative process can be valuable in divining the intent of Congress. The use of committee reports and floor debate (and lack of it), the difference between floor amendments and committee amendments, the trade-offs between statutory language and committee report language, the impact of conference committee changes in a bill, the effect of conflicting interpretations given by members during floor debate—all of these elements are weighed differently by judges, who have been exposed to the tortuous way in which a bill becomes law.

Others have also counseled the use of caution when relying on federal legislative

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Judge Kozinski has noted, "[t]he fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is." *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986).

Courts must use federal legislative history with healthy skepticism, recognizing that the history may not always be a trustworthy indication of congressional intent. As Justice Scalia has written "[C]ommittee reports, floor speeches, and even colloquies between congressmen are frail substitutes for bicameral vote upon the text

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history. Eskridge and Frickey, *Legislation: Statutes and the Creation of Public Policy*, 695-776 (1988), Eskridge and Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 324-340 (1990); Hertz, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. Pitt. L. Rev. 663, 678-87 (1987); Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 805-815 (1983).



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of a law and its presentment to the President." *Thompson v. Thompson*, --U.S.--, -- (1988) (Scalia, J., concurring). See also *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

In reaching the conclusion that FIFRA preempts local regulation, the majority opinion relies to a large extent on the interpretations of provisions of H.R. 10729 found in the Report of the House Committee on Agriculture and the Report of the Senate Committee on Agriculture and Forestry. The usefulness of those reports as evidence of Congressional intent is limited.

First, the House and Senate Committee Reports included in the legislative history of FIFRA and relied upon by the majority opinion, see majority op. pp. -, do not evaluate the pesticide bill passed by Congress. The Committees considered a significantly

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different and earlier version of the legislation. The Senate Commerce Committee added numerous amendments alter the Senate Agriculture and Forestry Committee had considered the legislation.<sup>5</sup> A joint Senate committee made up of members of the Agriculture and Forestry Committee and the Commerce Committee also further changed the bill reported to the Senate by the Commerce Committee and created a compromise bill.<sup>6</sup> The bill the Senate passed was further modified by the Committee of Conference composed of members of the House and Senate.<sup>7</sup> The relevance of the Committee reports to the

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<sup>5</sup>118 Cong. Rec. 32249-51 (1972).

<sup>6</sup>*Id.* at 32257-58.

<sup>7</sup>*U.S. Code and Cong. & Admin. News*, vol. 3, pp. 4130-4134 (1972).

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final bill passed by Congress and signed by the President is speculative.

Second, contrary to the assertions of the majority opinion, the language of sec. 136v can be interpreted in several ways. When the Senate Commerce Committee proposed amendments to clarify the role of local governments within FIFRA's regulatory structure, it interpreted sec. 136v as silent with regard to preemption. The Commerce Committee stated:

While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators.<sup>8</sup> (Emphasis added.)

The disagreement between the two committees over the meaning and effect of sec.

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<sup>8</sup>Id. at 4111.

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136v depreciates the value of the Agriculture and Forestry Committee's interpretation of sec. 136v in determining the "clear and manifest purpose of Congress." Despite this disagreement about the meaning of sec. 136v, the statute was never changed to clarify whether FIFRA preempted local regulation.

Third, the majority opinion's reliance on the Agriculture and Forestry Committee's report does not take into account the subsequent compromise the two Senate Committees reached. In order to avoid a confrontation over differences between the differing versions of pesticide legislation reported to the Senate, members of the Senate Committee on Agriculture and Forestry and the Committee on Commerce met for nearly two months of heated discussion. According to a report ultimately filed by the group and



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included in the legislative history, "Commerce Committee amendment[ ] . . . 10 (which authorized local governments to regulate the use of pesticides) . . . [is] not included in the substitute."<sup>9</sup> Rather than indicating that the group intended FIFRA to preempt local action, the more plausible explanation is that Congress never resolved the issue of preemption. In the interest of reporting a bill in the current session of Congress, members of both Senate committees agreed to disagree on the issue of preemption of local regulation.

Fourth, the majority opinion relies upon language added to the congressional record immediately prior to the final vote of the Senate to support its finding of preemption. See majority op. p.--. Upon examination of the

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<sup>9</sup>118 Cong. Rec., supra at 32252.

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Congressional Record,<sup>10</sup> I find that the language relied upon by the majority opinion is simply a restatement of the report of the Senate Committee on Agriculture and Forestry already cited by the majority. See majority op. p.--. For the reasons previously set forth, the Committee report is a questionable indication of congressional intent regarding the preemption of local regulation of pesticides.

Fifth, the majority opinion states that the Senate rejected the Commerce Committee's amendment that would have allowed local governments to regulate pesticides. See majority op. p.--. The majority opinion overstates what occurred on the floor of the Senate. The amendments offered by the Senate Commerce Committee were withdrawn from the

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<sup>10</sup>Id. at 32252-56.



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floor of the Senate in favor of the compromise struck by members of the Committee on Agriculture and Forestry and the Commerce Committee. As far as I can discern from the Congressional Record, the full Senate never considered the issue of local regulation of pesticides and therefore did not reject it by full vote.<sup>11</sup>

Finally, the majority opinion ignores the political atmosphere in which FIFRA was enacted and which probably accounts for Congress's failure to address the issue of local regulation. Both the Senate and the House were under intense pressure from agricultural, environmental and industrial groups regarding pesticide legislation. Congress worked for nearly two years attempting to forge the delicate compromise

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<sup>11</sup>*Id.* at 32252.

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necessary to pass a pesticide bill. The bill was considered highly controversial and was at risk of being defeated at nearly every turn. A number of speakers, including then Senator Gaylord Nelson of Wisconsin, rose to speak on the highly partisan nature of the debate and the fragility of the compromise reached on all sides.<sup>12</sup> In this turbulent political environment, the Senate never specifically considered the issue of preempting local governmental power, suggesting that the issue was not reached in the interest of passage of a pesticide bill.

The legislative history and the highly partisan nature of the debate suggest that

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<sup>12</sup>*Id.* at 32259. See also remarks of Senator Talmadge, *id.* at 32251 ("many of the issues were highly controversial"); remarks of Senator Packwood, *id.* at 32263 ("This package has evolved through much agony, deliberation, argument, reflection and compromise. Each has had to give some.").

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Congress was unable to agree about preemption of local regulation. While the compromise struck in FIFRA may have been necessary to ensure passage of the bill, I do not think that it demonstrates Congressional intent with sufficient certainty to deprive the citizens of the Town of Casey of the power to protect themselves and their environment.

IV.

I do not doubt that if Congress so chose, it could prevent localities from regulating pesticide use. See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). But absent "the clear and manifest purpose of congress" to accomplish such an end, the presumption against preemption and the right of citizens of the Town of Casey to regulate pesticides must prevail. In contrast to the majority opinion, I prefer construing FIFRA with "due regard for

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the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

For the reasons set forth, I dissent.

I am authorized to state that Justices Steinmetz and Bablitch join in this dissent.

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STEINMETZ, J. (dissenting). No affirmative license or general permit has been issued for pesticides by the state or federal government. The federal and state laws which were grants of affirmative authorization were discussed as preemptions as analyzed in *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 271 N.W.2d 69 (1978). If the federal government preempts, this will override the state's ability to act, but FIFRA, The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. sec. 136, et. seq., contemplates local regulations.

The Congressional Record contains a unanimously adopted committee report favoring preemption of local government regulation, but this recommendation came from only one house, the Senate, and not the entire Congress. See sec. 118 Cong. Rec. 32263 (1972). Indeed, the text of the transcript taken from the

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Congressional Record and relied upon by the respondents states only that committees from the Senate and House seemingly concurred on the local preemption issue. However, none of the specific Senate Agricultural Committee amendments read into the record clearly document this agreement and FIFRA's language does not document this.

The federal preemption test is whether legislation contains a clear, manifest intent. The United States Supreme Court expressed this test in the form of a starting-point assumption stating "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>1</sup> *Rice v.*

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<sup>1</sup>Congressional purpose to preempt may be manifested in a number of ways. First, Congress may expressly mandate preemption. Second, congressional language may impliedly preempt by adequately indicating an intent to fully occupy the field. Where both federal and



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*Santa Fe Elevator Corp.*, 331 U.S. 218, 230  
(1947).<sup>2</sup>

Implied preemption must also be clear. This is especially true in light of the United States Supreme Court's rule that a finding of implied preemption will be negated when there is no compelling congressional direction which justifies preemption of "interests so deeply rooted in local feeling and responsibility." *Farmer v. Carpenters*, 430 U.S. 290, 296-97 (1977); see also *Brown v. Hotel Employees*, 468 U.S. 491, 502-03 (1983). Here, any doubt must

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state law occupy the same field, preemption may be found only when state and federal law so conflict that concurrent compliance is physically impossible or when state law frustrates accomplishment of the full purpose of the federal act. See generally *Brown v. Hotel Employees*, 468 U.S. at 501.

<sup>2</sup>See also *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 715 (1985); *Florida Avacado Growers v. Paul*, 373 U.S. 132, 147 (1963); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984).

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be decided in favor of local authority to act: the preemption works for, not against local governments.<sup>3</sup>

When attempting to determine whether an act is or is not preempted, the bottom line is that "Congress can act so unequivocally as to make clear that it intends no regulation except its own." *Rice*, 331 U.S. at 236 (citing *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947)).

FIFRA does not meet the clear manifestation of intent test above to prove,

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<sup>3</sup>When analyzing a case for possible implied preemption, it is acknowledged that courts generally confine their studies to the language and legislative history of the statute in question. See *Chevron*, 726 F.2d at 491 n. 10. As stated within the text of this dissent, however, I find neither language nor history in FIFRA to meet the test of clarity necessary to find implied preemption. This is especially true in light of what I find to be a local government's justifiably deep interest in protecting the health and safety of its citizens through local control over pesticide use.

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as respondents claim, that Congress unequivocally intended local governments to be preempted from acting on their local concerns as to pesticide use. To the contrary, in applying the test, I find that the end product of the congressional committee and the vote of the entire Congress appears to have been in favor of no preemption.

Specifically, a comparison of the end product language found in FIFRA at 7 U.S.C. sec. 136v(a) and (b), provides strong and persuasive proof that the federal government did not intend to preempt local governments from enacting ordinances affecting pesticide use.

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Section 24(a), as amended, 7 U.S.C. sec. 136v(a)<sup>4</sup> authorizes states to regulate and impliedly authorizes states to delegate authority to local governments.<sup>5</sup> However, 7 U.S.C. sec. 136v(b)<sup>6</sup> contains an express

<sup>4</sup>7 U.S.C. sec. 136v(a), provides:

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

<sup>5</sup>I am unpersuaded by arguments that the narrow definition of the term "state" at 7 U.S.C. sec. 136(a) constitutes clear Congressional intent by elimination to preempt local government action in this area. At no point in the language of the act are states prohibited from exercising their powers to delegate authority to local entities. Likewise, I am unconvinced that the clearly divisive disagreement that plagued the legislative history of this act was so easily and decisively resolved to the conclusion the proponents of a narrow reading of "states" might suggest.

<sup>6</sup>7 U.S.C. 136v(b) provides:

(b) Such State shall not impose or continue in effect any requirements for



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preemption provision which prohibits states from enacting labeling laws. It is obvious from this subsection that where the full Congress desired preemption, the law expressly provided for it. Although sub. (b) only expressly prohibits states from dealing with labeling, it impliedly includes preemption of local governmental units in this area also. Any other interpretation would create an absurd result.

Congressional intent to allow local governments to take action in this area is

labeling of packaging in addition to or different from those required under this subchapter.

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also fairly implied from the express language of FIFRA sec. 22(b).<sup>7</sup> This section instructs the EPA administrator to cooperate with any agency of any political subdivision, i.e., city, village, town, of a state to secure uniformity of regulations. These instructions would be meaningless if local governments were not perceived as having the authority to adopt regulations in the first instance. Obviously, the full Congress contemplated there would be the authority in local governments to adopt pesticide laws for which the goal of cooperative uniformity would be sought.

<sup>7</sup>7 U.S.C. sec. 136t(b), reads:

(b) Cooperation

The Administrator shall cooperate with Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this subchapter, and in securing uniformity of regulations.



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Although individual committee recommendations may be persuasive, they do not dictate what the intent of the law is when it is adopted by the full Congress. That Congress debated the issue at great length without providing clear indications of preemption leads to the conclusion that no federal preemption was intended. See *Central Maine Power Company v. Town of Lebanon*, No. 5365 (Me. March 6, 1990); *People ex rel. Deukmejian v. Cty. of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984) (neither the language of FIFRA nor the legislative history of FIFRA evidence a clear, manifest intent of Congress to preempt local government control of pesticide use).

The test of state preemption, as well as the analysis to be followed, coincides closely

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with the federal rules stated *infra*.<sup>8</sup> See *Wis. Environmental Decade v. DNR*, 85 Wis. 2d at 536 (analyzing sec. 144.025(2)(1), Stats., for clear legislative purpose). It is important to note that, in this case, the town

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<sup>8</sup>See *Anchor Savings & Loan Ass'n v. Madison EOC*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984) which states the Wisconsin rule on preemption:

Where a municipality acts within the legislative grant of power but not within the constitutional initiative, the state has the authority to withdraw the power of the municipality to act. The tests for determining whether such a legislatively intended withdrawal of power which would necessarily nullify the local ordinance has occurred are:

(1) whether the legislature has expressly withdrawn the power of municipalities to act;

(2) whether the ordinance logically conflicts with the state legislation;

(3) whether the ordinance defeats the purpose of the state legislation; or

(4) whether the ordinance goes against the spirit of the state legislation.

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of Casey ordinance expressly states that the town is exercising its powers via secs. 60.10(2)(c)<sup>9</sup> and 60.22(3),<sup>10</sup> Stats., to

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<sup>9</sup>Section 60.10(2)(c), Stats., provides:

**60.10 Powers of town meeting.**

(2) DIRECTIVES OR GRANTS OF AUTHORITY TO TOWN BOARD . . . By resolution, the town meeting may:

(c) Exercise of village powers. Authorize the town board to exercise powers of a village board under s. 60.22(3). A resolution adopted under this paragraph is general and continuing.

<sup>10</sup>Section 60.22(3), Stats., provides:

**60.22 General powers and duties.** The town board:

(3) VILLAGE POWERS. If authorized under s. 60.10(2)(c), may exercise powers relating to villages and conferred on village boards under ch. 61, except those powers which conflict with statutes relating to towns and town boards.

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adopt powers otherwise granted to village boards under sec. 61.34(1), Stats.<sup>11</sup>

Having exercised this option, the town's enactment enjoys a presumption of validity which is lost only if it is found to be clearly illegal. See generally, *State ex rel. Grand Bazaar v. Milwaukee*, 105 Wis. 2d 203, 208-09, 313 N.W.2d 805 (1982); *Clark Oil &*

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<sup>11</sup>Section 61.34(1), Stats., provides:

**61.34 Powers of village board. (1) GENERAL GRANT.** Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.



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*Refining Corp. v. Tomah*, 30 Wis. 2d 547, 554, 141 N.W.2d 299 (1966). In that the ordinance is expressly enacted to protect the health, safety and general welfare of the town's citizens, it also enjoys the protection of being limited only by express language. See sec. 61.34(1), Stats.

As was the case with the federal act, I find no express or implied preemption or any conflict or logical inconsistency between the Casey ordinance and Wisconsin laws governing pesticides. Sections 94.67-94.71, Stats., specifically provide for the possibility of state regulation of pesticides. These sections of ch. 94 are not applicable to the town. They merely authorize the Department of Agriculture to promulgate rules declaring, for example,

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certain pesticides to be toxic to humans. See generally, sec. 94.69.<sup>12</sup>

Chapter 94 is neutral as to what local governments may do. Even absent clear neutrality, if state law discussed the issue of affirmative pesticide permits or general

<sup>12</sup>The following language from sec. 94.69(9), Stats., authorizes the department to promulgate rules governing the use of pesticides:

**94.69 Pesticides; rules.** The department may promulgate rules:

(9) To govern the use of pesticides, including their formulations, and to determine the times and methods of application and other conditions of use.

The language of this authority is permissive, however, and the corresponding Wisconsin Administrative Code sections speak only to restrictive uses of pesticides in that the rules promulgated expressly prohibit the use of certain pesticides (Ag 20.03), list those which may be used by special permit only (Ag 29.04), and explain procedures for receiving emergency use permits (Ag 29.06) and special local need registrations of otherwise prohibited pesticides (Ag 29.08).



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licenses absent clear preemptive language, a local ordinance could still stand. Such rules may run on parallel tracks.<sup>13</sup>

This is especially true where the state and local laws do not conflict. Here, both the ordinance of the town of Casey and state law have the same spirit and purpose which is to protect human health and the environment. A specific example may be found in the

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<sup>13</sup>Although this court has stated that a municipality can neither forbid what state law sanctions nor sanction what state law forbids, it has also stated that municipalities can regulate in addition to state action. In *Fox v. Racine*, 225 Wis. 542, 546, 275 N.W. 513 (1937), we stated that:

As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions. (Quoting 43 C.J. 219-20 sec. 220(b).)

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comparison of sec. 93.07(9), Stats., which places upon the department the duty to comply with ch. 160 to protect groundwater supplies, and the laws of Wisconsin Act 410, Laws of 1984 secs. 19, 20 and 21<sup>14</sup> which encourage counties, towns and cities, respectively, to act to protect ground-water resources.

It is interesting to note that sec. 94.709, Stats., the aldicarb pesticide section, expressly promotes department research into this pesticide's transport and mitigation into groundwater. See secs. 94.709(5)(a)1 and 2. In that local governments are statutorily encouraged to protect their groundwater supplies, it stands to reason they

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<sup>14</sup>See Wis. Act. 410, Laws of 1984, sec. 19 (statute sec. 59.97(1)); Wis. Act. 410 Laws of 1984, sec. 20 (statute sec. 60.74(1)(a)7, now codified at sec. 60.61(1)(g), Stats., Wis. Act. 532, 538 Laws of 1983)); Wis. Act. 410, Laws of 1984, sec. 21 (statute sec. 62.23(7)(c)).

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are authorized to enact ordinances addressing, at least to this extent, local pesticide use.<sup>15</sup> Since it is reasonable to assume municipalities may act to protect groundwater supplies, it would be an anomaly to find that these same municipalities cannot act to also protect their food supplies, homes, work and recreational areas from pesticide contamination. Where the state affirmatively authorizes emergency use permits or special local needs permits, local governments would

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<sup>15</sup>Chapter 162, the Pure Water Act, stands in contrast to the clear encouragement to take action found in the statutes cited *supra* at note 14 and accompanying text. Chapter 162, the Pure Water Act, expressly preempts (with small exception) cities, towns and villages from regulating in the area of construction and reconstruction of wells and other methods of obtaining groundwater for human consumption. See secs. 59.067(5) and 59.06(1), Stats.; see generally ch. 162.

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be preempted from acting against such permits.<sup>16</sup> Since this was not the case relative to the town of Casey ordinance, I find no form of state preemption which works to void the local effectiveness of this enactment.

I am further unpersuaded by arguments that a call for uniformity effectively preempts local action in this area. Specifically, sec. 93.07(15), Stats., speaks to uniformity only in that it expressly provides that the Department of Agriculture will cooperate with local governments to try and achieve the goal of uniformity. Similarly, while sec. 93.07(1) entrusts the department with the duty to enforce ch. 94, the accompanying sec. 93.06(11), contemplates the adoption of local regulations by "political

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<sup>16</sup>See Ag. 29.04 Wis. Adm. Code; Ag. 29.06 Wis. Adm. Code, Ag. 29.08 Wis. Adm. Code.



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subdivisions of the state," the uniformity of which is to be secured through cooperation with those subdivisions by the department. Such provisions are certainly an antithesis of local government preemption.

Chapter 106 Laws of 1977 sec. 1, Statement of Purpose, provides that state regulations should not exceed any federal standards in that state regulations may not be more strict than federal rules. This is not uniformity.<sup>17</sup> Section 94.69 gives the Department of Agriculture authority to go

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<sup>17</sup>Chapter 106, Laws of 1977 sec. 1 Statement of Purpose reads:

The legislature finds the need to update the regulation of the use and application of pesticides. It is the intent of the legislature that the State's regulations shall not exceed any federal standards adopted under the federal insecticide, fungicide, and rodenticide act or regulations issued under the act.

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beyond federal regulation.<sup>18</sup> This is not uniformity. Uniformity is a desired goal achieved through cooperation. Uniformity is not preemption since it does not involve conflict.

The town ordinance is a permitting, not a prohibitive, ordinance. The town is acting under its police powers when it grants or denies permits. The ordinance has the reasonable goal of trying to minimize risks to protect the health, safety and general welfare of the local citizens. The town board is not superseding the EPA labeling rules when it acts. The label is a restriction, not a general permit, and it is one factor taken

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<sup>18</sup>Section 94.69, Stats., illustrates that the legislature did not intend the extent of state regulations to be limited to a mirror image of federal regulations. Subsecs. (6), (7), (10) and (12) contemplate state regulations different and beyond areas covered by federal regulation.



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into consideration by the town as it reviews a permit application. The town of Casey ordinance is not a blanket prohibition of pesticide use in the town. Rather, it is a valid, affirmative act under a local government's police powers to keep tabs on activities that may have a negative impact on the welfare of its citizens. For these reasons, I would uphold the ordinance.

I am authorized to state that JUSTICE WILLIAM A. BABLITCH joins this dissenting opinion.

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89-1905

FILED

JUN 5 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

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WISCONSIN PUBLIC INTERVENOR, and TOWN OF  
CASEY,

Petitioners,

v.

RALPH MORTIER and  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION,

Respondents.

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APPENDIX VOLUME II

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THOMAS J. DAWSON  
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& State of Wisconsin  
Public Intervenor  
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Counsel of Record

LINDA K. MONROE  
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Madison, WI 53703  
Counsel for Petitioner  
Town of Casey

## COPY

STATE OF WISCONSIN      CIRCUIT COURT WASHBURN  
COUNTY

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Ralph Mortier and	)	PARTIAL TRANSCRIPT
Wisconsin	)	--FINDINGS BY THE
Forestry/Rights-	)	COURT
of-Way/Turf	)	MOTION HEARING
Coalition,	)	
Plaintiffs,	)	CASE NO. 86 CV 134
vs.	)	
Town of Casey,	)	
Wisconsin, Imbert M.)	)	
Eslinger, Louis N. )	)	
Place, and Roland K.)	)	
Colby,	)	
Defendants.	)	

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The above-entitled matter came duly on hearing before Hon. Dennis C. Bailey, Circuit Judge, on May 16, 1988, at the Washburn County Courthouse, Shell Lake, Wisconsin.

**APPEARANCES:**

PAUL G. KENT, Attorney at Law, DeWitt, Porter, Huggett, Schumacher & Morgan, PO Box 2509, Madison, WI, 53701, appearing for and on behalf of the plaintiffs;

RICHARD J. LEWANDOWSKI, Attorney at Law, DeWitt, Porter, Huggett, Schumacher & Morgan, also appearing for the plaintiffs;



THOMAS J. DAWSON, Attorney at Law,  
appearing as Wisconsin Public Intervenor for  
the State; PO Box 7857, Madison, WI, 53707;

LINDA MONROE, Attorney at Law, 217 South  
Hamilton, Suite 409, Madison, WI, 53703,  
appearing for and on behalf of the defendants  
Town of Casey.

FINDINGS BY THE COURT:

Well, counsel and the court agree on one thing, first of all, and that is that the issue before the court is purely a legal issue. It's not the function of this court, or any other court for that matter, to decide the policy questions of which level of government is more appropriate to regulate and control the use and nonuse of pesticides and herbicides. While I may personally feel that the local control is probably more effective control than is control from the EPA office in Washington or wherever else, that's beside the point totally.

The question is, of course, as counsel have pointed out, is whether or not pursuant to the Supremacy Clause of the US Constitution, the federal government, in passing the FIFRA law, has in fact preempted the area of regulation and use of pesticides from the local governments, which in Wisconsin, of course, traditionally, the powers of the Town Board has adopted -- or strike that -- the powers which the Town Board has by adopting the Village powers, without question, does have the power to pass ordinances such as the ordinance under question in order to further the health and welfare of the public; no question about that. The question is whether or not the federal government and/or the state government has preempted that area pursuant to the authority granted to the federal government by the Constitution of the United States.

The court does find that the town ordinance in question is an extremely broad

ordinance and on its face does cause conflict with the state and federal regulations covering the pesticide and herbicide issues.

The court in looking at the issue of federal preemption, does look at the statutory language contained in FIFRA and does take note of the fact that FIFRA does, indeed, provide that the state -- which does not include political subdivisions of the state and elsewhere in the FIFRA language, itself, where Congress intended to include a reference to political subdivisions -- the words state and political subdivisions are, indeed, used showing a consciousness of Congress and the drafters of that legislation to the distinction between states and states and the political subdivisions thereof.

There is argument by counsel as to what is meant by express preemption. There is no disagreement between counsel that if either the state or federal law specifically said in the law, itself, that this area is hereby

preempted from all state, local subdivisions, political subdivisions, we'd all agree that that's express preemption. Whether or not we want to call it some level of express preemption or implied preemption, this court does find and conclude that the area of regulation and use of pesticides and herbicides has been preempted by federal law. And the example I gave for the statutory language is part of the language which is used and the, well, the language and the rationale used by the court to determine whether or not preemption has taken place.

The compelling documentation before the court regarding legislative history leads this court to the same conclusion as was adopted by the Maryland court in the Maryland Pest Control case. In order to determine whether or not there was federal preemption, the court must look at the Congressional intent. And one manner of looking at Congressional intent is by looking at the legislative history. And

one other area where counsel is in agreement is as to that wording of the legislative history regarding the ultimate passage of the FIFRA.

The court agrees with plaintiffs' counsel that the reading of the legislative history does not show that there was a compromise including language in FIFRA which would expressly allow regulation by local political subdivisions or language which expressly disallowed that. The only question before Congress and before the Senate and the House as well as their respective committees was whether to include language which would permit regulation by the local subdivisions, local political subdivisions. It comes across clear in the legislative history that it was clearly the intent of the drafters of this legislation and the intent of the Congressional committees and ultimately the intent of Congress, itself, that the language, as ultimately passed, would preempt or would prohibit the regulation by

local political subdivisions. Although there is some language in the Maryland Pest Control case that I am sure both counsel and myself agree was kind of sloppy, one portion of this language I don't think was sloppy and I virtually adopt and that was where the Maryland court stated as follows:

"As previously indicated, this legislative history could not be more clear. Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation. Principled decision-making and respect for the integrity of the legislative process compel the



conclusion that Congress knew and meant what it was doing." This court agrees with that.

And finally, as alluded to previously, because of the broadness of the language in the town ordinance, the court does find that that ordinance does, indeed, conflict with the language contained in FIFRA as well as Chapter 94 Wis Stats for the reasons as already cited by counsel; that under that language of the ordinance, the Town Board could, indeed, in their own discretion permit or prohibit the use of a certain pesticide, irregardless of what state or federal law had to say on the particular matter.

And I do hope that -- I do feel that there is definitely a role to be played by the local political subdivisions such as the town boards, the cities, counties, since they are the people who are right on top of the situation. They are the people who live with it. Whether it be in the administration of the provisions or whatever I do hope, and

certainly by the urging of local citizens, that the state and Congress would further expand on these laws so as to include a role to be played by the local bodies of government for the ultimate protection and health of us as citizens. But I as the court or the court speaking here cannot do that and that is not the function of the court. I'm merely expressing some of my own personal views there.

The court further finds and concludes that the area of pesticide use and regulation has also been preempted from the local political bodies by state law. The court is not going to make any specific finding with reference to the comprehensiveness or lack of comprehensiveness with reference to the federal law FIFRA or Chapter 94 of the Wisconsin Statutes. The court feels that the term comprehensive is subjective at best and certainly there are few, if any, laws that are totally comprehensive in their application and

direction with reference to particularly an item such as this where one is regulating the use and control of various pesticides and herbicides which are day-to-day being remade and with the continuing scientific exploration into having these pesticides and herbicides become more selective, if you will, towards attacking what it is they are intended to attack without any adverse side effects on human beings as well as our wild life and our trees and other habitat.

(This concludes the  
findings by the court.)

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Jul 05 1988

STATE OF WISCONSIN CIRCUIT COURT WASHBURN  
COUNTY

Ralph Mortier and	-	FILED Jun 16 1988
Wisconsin	-	Patrick E.
Forestry/Rights-of-	-	Harrington
Way Turf Coalition,	-	Clerk of Circuit
	-	Court Washburn
	-	County
Plaintiffs,	-	FINDINGS OF FACT,
	-	CONCLUSIONS OF LAW
v.	-	AND ORDER
	-	
Town of Casey,	-	Case No. 86-CV-134
Wisconsin, Imbert	-	
M. Eslinger, Louis	-	
N. Place and Roland	-	
K. Colby,	-	
	-	
Defendants.	-	

The above-captioned matter having come before the Court, the Honorable Dennis C. Bailey, Circuit Judge, presiding on May 16, 1988, for a hearing on Plaintiff's motion for summary judgment; and the Court having considered pleadings, briefs and supporting papers, and oral argument of counsel; and the Court having issued an oral decision from the bench granting Plaintiff's motion; the Court

hereby makes the following findings of fact and conclusions of law and order.

FINDINGS OF FACT

1. The Plaintiff Ralph Mortier is an adult resident of the City of Spooner, Washburn County, Wisconsin, residing at Route 3, Box 3360, Spooner, Wisconsin 54801.

2. The Plaintiff Wisconsin Forestry/Rights-of-Way/Turf Coalition is a not-for-profit voluntary association of individuals, businesses or associations whose members have used and may wish to use federally-registered pesticides to their land. Its business office is located at 1400 East Washington Avenue, Suite 185, Madison, Wisconsin 53703.

3. The individual defendants, Imbert M. Eslinger, Louis N. Place and Roland K. Colby, are all adult residents of the Town of Casey and were at the time the lawsuit was initiated, members of the Town Board and were sued in their official capacity.

4. The Defendant Town of Casey is a town organized and governed by the provisions of Wis. Stat. Ch. 60, which has adopted village powers under Wis. Stat §60.22(3).

5. The Wisconsin Public Intervenor, a duly designated Assistant Attorney General under Wis. Stat. §165.07, moved to intervene and was granted status as a party by order of the Court on October 1, 1986.

6. Jurisdiction and venue is properly vested in this Court.

7. The Plaintiffs have the requisite standing to bring this action.

8. This action represents a justiciable controversy.

9. On or about September 10, 1985, the Defendant Town of Casey enacted Ordinance 85-1 with respect to the regulation of pesticides which is incorporated by reference.

10. The federal government regulates pesticides under the provisions of the Federal



Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 USC §136, et seq.

11. The State of Wisconsin regulates pesticides under Wis. Stats. §§94.67 - 94.71.

#### CONCLUSIONS OF LAW

1. It was the intent of Congress that the language in FIFRA would preempt and prohibit the regulation of pesticides by local governments. As a result, the area of local pesticide regulation has been preempted by federal law.

2. It was the intent of the Legislature to preempt the regulation of pesticides by local governments. As a result, the area of local pesticide regulation has also been preempted by state law.

3. Town Ordinance 85-1 conflicts with federal and state law and regulations.

#### ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and for the reasons set forth in the Court's oral decision of

May 16, 1988, which is incorporated herein by reference, IT IS HEREBY ORDERED:

A. Town of Casey Ordinance 85-1 is void, invalid and of no effect, and the Defendants, their agents, successors, assigns and all others acting in concert therewith are hereby enjoined and restrained from enforcing or in any other way requiring compliance with the Ordinance.

B. The Plaintiffs are entitled to their statutory costs of \$45.00 filing fee, \$27.40 service fees and \$100 attorneys fees.

Dated this 14th day of June, 1988.

BY THE COURT:

/S/ \_\_\_\_\_  
Hon. Dennis C. Bailey  
Circuit Court Judge

Approved as to form:

/S/ _____	/S/ _____
Thomas J. Dawson	Paul G. Kent
Public Intervenor	Attorney for Plaintiffs

/S/ \_\_\_\_\_  
Linda Monroe  
Attorney for Town of Casey

WHEREAS, the Washburn County Agriculture Committee has applied pesticides for the purpose of conifer release to county forests within the Town of Casey; and

WHEREAS, research indicates that no pesticide is completely safe and that pesticides previously used by the County Agriculture Committee in the Town of Casey may be hazardous to human health in the following ways: 2,4-D has been found to be carcinogenic, teratogenic, mutagenic, and can cause peripheral neuropathy. Persistence in soil beyond one year is possible. 2,4-DP has been found to be carcinogenic, and can cause miscarriage. Glyphosate can form carcinogenic compounds in soil. Picloram has been found to be carcinogenic, may cause peripheral neuropathy, accumulates in soil and may persist over 20 years; and

WHEREAS, county forest lands are to be managed so as to provide recreational opportunities and assure maximum public benefits, sec. 28.11(1), Stats., and county

APPENDIX C

benefits, sec. 28.11(1), Stats., and county forest lands in the Town of Casey are, in fact, used by the permanent and summer residents of Casey for recreation, including hunting and berry-picking; and

WHEREAS, the plants sought to be controlled in county forests by application of pesticides do not pose an imminent threat to forest crops, and can be controlled over the longer period of time required for scheduled mechanical removal of competing broadleaf plants; and

WHEREAS, the Town of Casey desires to protect its residents from the danger of consuming game or berries taken from an area to which pesticides have been applied, and from coming in contact with these pesticides on public lands or roads; and

WHEREAS, aerial spraying of pesticides increases the risk of injury or damage to persons, property and the environment, due to the increased likelihood of pesticide drift

and pesticide overspray; and

WHEREAS, lakes and streams in the Town of Casey are important environmental and recreational resources, and aerial spraying of pesticides can affect and has affected these waters as a result of drift and/or overspray; and

WHEREAS, aerial spraying of pesticides in the Town of Casey has affected property beyond the boundaries of the target area as a result of drift and/or overspray; and

WHEREAS, the Town of Casey desires to protect its residents, recreational resources and private and public property from injury or damage due to drift or overspray of pesticides; and

WHEREAS, the Town of Casey has previously indicated, by resolution, its strong opposition of pesticides; and

WHEREAS,, on the 9th day of April, 1983, at the Annual Meeting of the Town of Casey, the Town of Casey granted to the Town Board of

Casey, village powers under sec. 60.18(12), Stats. (1981-82); and

WHEREAS, the Town Board, under the authority of secs. 61.34(1) and (5), Stats., does deem it in the interests of the Town to protect the health, safety, and general welfare of its township, community and residents;

NOW, THEREFORE, the Town Board of the Town of Casey does ordain that Ordinance No. 85-1, entitled "An Ordinance to Require a Permit for the Application of Pesticides," be created to read as follows:

#### Ordinance No. 85-1

#### An Ordinance to Require a Permit for the Application of Pesticides

#### Section 1. Application of Pesticides Permit Process.

1.1 Definitions. (1) "Person" means any individual, group of individuals, partnership, associaton, corporation, government, governmental



agency, or other entity or combination of entities.

(2) "Pesticide" means any substance or mixture of substances labeled or intended for use or used for:

(a) preventing, destroying, repelling, or mitigating any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, or other micro-organism (except viruses, bacteria or other micro-organisms on or in living persons or other living animals) declared to be a pest under federal or state law (7 U.S.C. § 136 et seq., sec. 94.67 et seq., Wis. Stats., and regulations issued under those laws); or

(b) defoliating plants,

regulating plant growth or accelerating the drying of plant tissue.

(3) "Aerial Application of Pesticides" means the release of pesticides from any aircraft.

(4) "Public Lands" means all lands and all interests in lands owned by the state, the County of Washburn or the Town of Casey either as proprietor or as trustee, and which are dedicated in whole or in part to public use and benefit.

(5) "Private Lands" means all lands which are not public lands.

1.2 Application of Pesticides. No person may apply any pesticide to public lands, or to private lands subject to public use (including, but not limited to Forest Croplands, as defined in chapter 77, Stats.), or may aerially apply any pesticide to private lands within the Town of Casey except after obtaining a permit under section 1.3

### 1.3 Permit Process. (1) Permits.

Permits may be issued by the town board for a single application of pesticide(s), or for a series of applications of pesticide(s) to a single defined area, provided the last application of the series will be completed within 60 days of the first application of the series.

(2) Request for permit. Any person who intends to apply any pesticide to public lands, or to private lands subject to public use, or who intends to aerially apply any pesticide to private lands, shall, not less than 60 days before the proposed application, file a request for permit and information with the Town Board, on such forms as the Board may prescribe. Forms may be requested from the Town Clerk, whose address is:

Town of Casey Star Route  
Box 137  
Spdoner, Wisconsin 54801

The information shall include, but shall not be limited to:

(a) the purpose for the desired application(s);

(b) the approximate date(s) and time(s) of the application(s);

(c) the areas of the Town of Casey to be affected by the application(s);

(d) an inventory of the pesticide(s) to be used listing the brand name, generic component ingredients, the quantities to be used, method of application, known benefits and know risks associated with the chemical(s) to be used;

(e) the chemical and non-chemical alternative methods or treatments available to accomplish the desired objectives and the reasons why the application of the proposed pesticide(s) is preferable to alternative chemicals and to other methods;

(f) the status of the proposed

pesticide(s) and of any chemical alternatives in the federal Environmental Protection Agency's (EPA) pesticide reregistration program including but not limited to:

i. the status of the proposed pesticide(s) and any chemical alternatives in the Data Call-In Program, including whether a Data Call-In Notice or equivalent has been issued, whether the EPA has reached a final decision regarding data that are required, and the status of data collection;

ii. the status of the proposed pesticide(s) and any chemical alternatives in the Registration Standards Program, including whether and when a Registration Standard or Guidance Package has been issued;

iii. the status of the proposed pesticide(s) and any chemical alternatives in the Special Review

Program including Pre-Special Review status, whether and when Position Documents 1, 2, 2/3 or 4 have been published or are expected to be published, what presumptions against registration are presented in those Documents, which risk criteria, as defined in 40 CFR sec. 162.11, have been possibly met or exceeded, and the EPA's regulatory action or proposed action for the pesticide(s);

(g) the positive and negative effect of reducing or eliminating the use of the proposed pesticide(s) and of any chemical alternatives;

(h) the anticipated impact of the application upon humans, animals and plants of the proposed pesticide(s) and of any chemical alternatives;

(i) the precautions that will be taken to protect the public and to minimize public exposure to the proposed



pesticide(s) and to any chemical alternatives, and the actions that will be taken to mitigate any adverse impacts of the application of the proposed pesticide(s) and of any chemical alternatives; and

(j) such other information as may be required.

(3) Initial Determination by Town Board. Within 15 days after receipt of a completed request for permit and information, the Town Board, after consideration of the information, shall post in 3 places in the town and mail to the person requesting the permit notice of its decision to either deny the permit, grant the permit, or grant the permit with conditions. When the Board denies or places conditions on a permit, it shall state the reasons therefor. The board may impose any 'reasonable conditions on a permitted application related to the protection of the health, safety and welfare

of the residents of the Town of Casey. Such requirements may include, but shall not be limited to:

(a) a requirement that an application be confined to an area not used by the public for recreation;

(b) a requirement that a reasonable method of ground application, rather than aerial spraying, be used.

(4) Request for Hearing. Within 5 business days after mailing notice of the Board's initial determination to the person requesting a permit, and posting such notice in the town, the person requesting a permit or any town resident may request a hearing before the Board.

(5) Hearing.

(a) A hearing before the Town Board shall be scheduled within 20 days after receipt of a written request for hearing. Notice of the hearing shall be posted in 3 public places in the Town of

Casey and shall be published in a newspaper of general circulation in the Town of Casey, not less than 5 days before the hearing.

(b) Any person requesting a hearing may present information before the Board relating to the safety of the chemicals proposed to be applied, or of the method of application, the costs of the proposed application compared to the costs of alternatives to the application, or any other items of information relating to application of pesticides.

(c) After consideration of information produced at the hearing and contained in the request for permit, the Board shall either deny the permit, grant the permit, or grant the permit with conditions relating to the protection of the health, safety and welfare of town residents.

(d) Notice of the final

decision of the board shall be mailed to the person requesting the permit within 5 days of the hearing. If the final decision differs from the initial decision, the board shall state the reasons therefor.

(6) Fees. A person requesting a permit to apply pesticides shall include a fee of \$25 with the request to cover costs of processing the request.

(7) Notice. When a permit to apply pesticides is granted, or granted with conditions, the permittee will post placards giving notice of the application(s).

(a) Each placard shall contain the words: "WARNING--AREA TREATED WITH PESTICIDE" in one-inch block letters. the placards shall also contain, in letters at least 1/4 inch high, the intended date(s) and time(s) of application(s), the brand name and generic component ingredients of the

pesticide(s) used, and any label information prescribing safe reentry time to the area of application.

(b) Placards shall be posted at least 24 hours prior to the intended application, or, in the case of multiple applications of pesticide(s) to a single area, at least 24 hours prior to the first such application. If the application date is changed, a new notice shall be given as soon as reasonably possible prior to the application. Placards shall be maintained for at least 6 months after the last date of application allowed by the permit.

(c) If the application is to public lands; or to private lands subject to public use; or if the application is to private lands not subject to public use, but the area to which pesticides are applied is within 100 feet of a road, other public right-of-way, or land not

owned or controlled by the permittee; then notice shall be posted approximately every 1/4 mile along the perimeter of the treated area and any normal access points from roads or other public rights-of-way.

## Section 2. Penalty.

Any person who violates any of the provisions of this ordinance, or directs another to violate it, shall in addition to being liable for all damages resulting from each violation, be subject to a forfeiture of up to \$5,000.00 for each violation thereof. Each day shall constitute a separate violation.

## Section 3. Severability.

If any section, sentence or clause of this ordinance is held invalid or unconstitutional, such holding shall not affect the validity of the remaining portions of the Ordinance.

## Section 4. Effective Date.



This Ordinance shall take effect upon passage by the Town Board and publication as required by law.

The foregoing Ordinance was duly adopted by the Town Board of the Town of Casey at a regular meeting of the Town Board on September 10, 1985.

Imbert Eslinger, Town Chairman

Mary Emerson, Town Clerk

Adopted: Sept. 10, 1985

Published: Sept. 19, 1985

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1865

COPARR, LTD. and VICTOR A.  
CARANCI,

Plaintiffs,

v.

THE CITY OF BOULDER,

Defendant.

FILED  
UNITED STATES  
DISTRICT COURT  
DENVER, COLORADO  
OCT 3 1989  
JAMES R.  
MANSPEAKER  
CLERK

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JUDGMENT

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Pursuant to the memorandum opinion and order entered by U. S. District Judge Richard P. Matsch on October 3, 1989, it is

ORDERED AND DECLARED that that those provisions of the Boulder Revised Code that were enacted by Ordinance No. 5083 are void and invalid; that the City of Boulder is enjoined from enforcing them against the plaintiffs; that those provisions of the Boulder Revised Code that were enacted by

APPENDIX D

Ordinance No. 5129 are valid and may be enforced and that no attorneys' fees or costs will be awarded to any party.

Dated: October 3, 1989

JAMES R. MANSPEAKER, CLERK

By: Jacob Gilmore /s/  
Deputy Clerk

APPROVED:

Richard P. Matsch/s/  
Judge Richard P. Matsch

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1865

COPARR, LTD. and VICTOR A.  
CARANCI,

Plaintiffs,

v.

THE CITY OF BOULDER,

Defendant.

FILED  
UNITED STATES  
DISTRICT COURT  
DENVER, COLORADO  
OCT 3 1989  
JAMES R.  
MANSPEAKER  
CLERK

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This civil action challenges Ordinance Numbers 5083 and 5129 enacted by the City of Boulder with respective effective dates of December 31, 1987, and August 5, 1988. The ordinances are now incorporated into the Boulder Revised Code. The plaintiffs are the Colorado Pesticide Applicators for Responsible Regulation ("Coparr"), a non-profit trade association of commercial pesticide applicators, and Victor Caranci, a manager of

residential property in Boulder who contracts for the commercial application of pesticides and personally applies pesticides on that property, as needed. The plaintiffs seek 1) a declaratory judgment that the ordinances are void under the Supremacy Clause of the U. S. Constitution, Article VI, Clause 2 because such local regulations are pre-empted by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq; 2) an injunction against enforcement of the ordinances; 3) an injunction against the enactment of any ordinance regulating the sale and use of pesticides as covered by FIFRA; and 4) attorney's fees under 42 U.S.C. § 1988. Jurisdiction is alleged under 28 U.S.C. §§ 1331, 2201, and 2202. The legal questions have been presented by cross motions for summary judgment. There are no genuine issues of material fact. Oral argument was heard on March 16, 1989.

In general, FIFRA requires that all pesticides be registered with the Environmental Protection Agency (EPA) prior to sale. The EPA Administrator may classify pesticides for general or restricted use; promulgate certification standards for applicators of restricted pesticides; impose packaging and labeling requirements upon pesticides; and prescribe regulations for making and maintaining records. Pursuant to Section 136v of FIFRA, 7 U.S.C. § 136v, Colorado has enacted the Colorado Pesticide Act, C.R.S. § 35-9-101 et seq. and the Colorado Pesticide Applicator's Act, C.R.S. § 35-10-101, et seq.

The defendant argues that this court lacks jurisdiction to grant the declaratory relief requested by plaintiffs, citing Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983). In Franchise Tax, a state agency sought a declaration that its tax levies were



not pre-empted by ERISA. The case was removed to the federal court. The Court held that federal jurisdiction did not exist, even though the defendant could have filed a coercive action in federal court to enjoin application of the state regulation. The distinction was that the federal claim would arise only as a defense to an action brought under state law. This case is different, as the Court recognized in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 at n. 14 (1983). Here, as in Shaw, the plaintiffs seek a declaratory judgment that local law is pre-empted under the Supremacy Clause. The federal question is the controlling element of the plaintiffs' claims. Accordingly, the dispute is within the subject matter jurisdiction granted in 28 U.S.C. § 1331.

The Boulder ordinances are currently in effect and require an immediate and significant change in the plaintiffs' conduct. The case is therefore ripe for determination

even though no enforcement action is pending. Abbott Laboratories v. Gardner, 387 U.S. 136, 153 (1967) (authorizing pre-enforcement judicial review of food and drug regulations where they require "an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance").

The plaintiffs have presented affidavits showing that the Boulder ordinances will subject them to fines and imprisonment; will have a significant detrimental affect on their ability to conduct business; will interfere with applicators' ability to determine application dates on an ad hoc basis as permitted by prevailing weather conditions; and that the posting of notices will create an unfavorable impression on the public regarding pesticide application.

The defendant contends that "neither plaintiff has standing to challenge both ordinances and, therefore, each plaintiff's

challenge must be limited to the ordinance in which each has a concrete stake in the outcome." Defendant's motion at 2. That assertion has no practical effect. Plaintiffs in the aggregate have standing to challenge both of the Boulder ordinances and there is an obvious connection between the requirements affecting property owners and those affecting commercial applicators.

The parties agree that Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, (1986) established the following criteria for determining federal pre-emption:

The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal

law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.

Id., at 368-69 (citations omitted).

The plaintiffs rely primarily upon section 136v of FIFRA, 7 U.S.C. § 136v, to support their position that Congress intended to pre-empt local regulation of pesticides by authorizing limited state regulation in these words:

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

(c)(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the



purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator.

The argument is that this express grant of state authority without mention of local governments expresses an intent to exclude them from the field of pesticide control.

The submitted legislative history is not conclusive of Congressional intent. The House Agricultural Committee "rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511 at 16. The Senate Committee on Agriculture and Forestry agreed with that position. S. Rep. No. 92-838, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 3993, 4008. The Senate Commerce Committee disagreed, and proposed an amendment specifically authorizing local governments to regulate the use of pesticides. S.Rep. No.

92-970, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4111.

The compromise bill passed by a Senate vote of 71-0 did not contain any provision explicitly authorizing local regulation. See 118 Cong. Rec. 32263. Senator Allen, chair of the subcommittee on Agricultural Research and General Legislation, inserted into the Congressional Record (with unanimous consent) an excerpt from the Senate Committee on Agriculture and Forestry Report, stating that FIFRA "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." Id. at 32256. The joint explanatory statement of the Conference Committee did not address the subject of local regulation. Conference Report No. 92-1540, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4130.



Courts have come to different conclusions about this legislative history. In Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109, 111 (D. Md. 1986), aff'd without opinion, 822 F.2d 55 (4th Cir. 1987), the court found that "the evidence is clear that Congress . . . concluded that only States and not their subdivisions should be authorized to regulate the sale and use of pesticides." In People ex rel Deukmejian v. Mendocino County, 683 P.2d 1150, 1160 (Cal. 1984), the court found that "[T]he legislative history [of section 136v of FIFRA] does not demonstrate a clear congressional intention to preempt traditional local police powers to regulate the use of pesticides or to preempt state power to distribute its regulatory authority between itself and its political subdivisions." The court read the legislative history as adopting a compromise position by which local regulation was neither authorized nor prohibited. The states were left free to

determine whether their powers should be exercised directly, by political subdivisions, or both.

The California court's approach is consistent with the historical view of state sovereignty and the state's freedom to distribute regulatory power between itself and its political subdivisions. This court agrees with that analysis. In Colorado, the state constitution grants to the people of home rule cities "the full right of self-government in both local and municipal matters." Colorado Constitution, Art. XX, Section 6. Boulder is a home rule city with the powers granted by Article XX. To the extent that pesticide regulation can appropriately be characterized as a "local matter," Boulder has the same authority as the state. There is no doubt that the use of pesticides within a city is a matter affecting the health and welfare of the people in it. Accordingly, the subject is a

matter for local concern and is within the legislative power of a home rule city.

In addressing the broad question of whether FIFRA has "occupied the field" of pesticide regulation, there is a presumption that "local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985). Boulder maintains that its ordinances address the where, when, and how of pesticide application in the city, issues outside the scope of FIFRA. That claim is too broad. It is also in conflict with those provisions of Ordinance No. 5083 that provide for local enforcement of FIFRA, the Pesticide Act, the Pesticide Applicator's Act and regulations promulgated thereunder by incorporating them. The result is that the violation of any of their provisions constitutes a violation of the Boulder ordinance and exposes the violator to the

sanctions of the Boulder Revised Code. It is obvious that enforcement is an integral part of any regulatory system. To permit Boulder to engraft the national and state laws into its regulatory scheme would undermine the conclusions that there are legitimate areas of local concern not addressed by the Congress and state legislature. While mutual exclusivity is not required, there would be an inversion of the pyramid of power if municipal law enforcement agencies interpreted and applied state and federal law.

Because the Colorado Pesticide Act and Pesticide Applicators' Act were enacted in recognition of and are complementary to FIFRA, the pre-emption doctrine is applied as if those state statutes are a part of the federal law. It is not possible to sever provisions of Ordinance No. 5083. Taken as a whole, that ordinance is invalid because it is in conflict with FIFRA. The Boulder City Council carefully avoided such a conflict when it



adopted Ordinance No. 5129. It imposes notification requirements prior to the airborne application of pesticides on users and the contracting parties, not commercial applicators. Post-application notification is required for applications to lakes. The plaintiffs have failed to show any conflict between the separate notification requirements of that ordinance and the federal-state regulatory system. The assertion that compliance may be difficult because of weather conditions is insufficient to establish a barrier or conflict with federal and state law.

The plaintiffs are entitled to a judgment declaring Ordinance No. 5083 null and void and to an injunction prohibiting the enforcement of its provisions. The plaintiffs' attack on Ordinance No. 5129 is rejected. That ordinance is valid and enforceable. The plaintiffs' request for an injunction from enacting any ordinance regulating the sale and

use of pesticides as set forth in FIFRA is rejected because of this court's conclusion that there is an area of legitimate local regulatory power. Because this litigation has produced mixed results and the plaintiffs' broad claim of pre-emption has been denied, no attorneys' fees will be awarded.

Upon the foregoing, it is

ORDERED that judgment will enter declaring that those provisions of the Boulder Revised Code that were enacted by Ordinance No. 5083 are void and invalid; that the City of Boulder is enjoined from enforcing them against the plaintiffs; that those provisions of the Boulder Revised Code that were enacted by Ordinance No. 5129 are valid and may be enforced and that no attorneys' fees or costs will be awarded to any party.

Dated October 3, 1989

BY THE COURT:

Richard P. Matsch/s/  
Richard P. Matsch, Judge



IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

PROFESSIONAL LAWN CARE  
ASSOCIATION OF AMERICA,

Plaintiff,

-v-

No. 89-1439

VILLAGE OF MILFORD,  
MICHIGAN.

Defendant,

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Proceedings had before the Honorable  
Horace W. Gilmore, United States District  
Judge, at Detroit, Michigan, on Thursday,  
August 24, 1989.

APPEARANCES:

KENNETH A. FLASKA  
JOSEPH D. LONARDO  
Appearing on behalf of Plaintiff

PATTI A. GOLDMAN  
PAUL V. GROTH  
Appearing on behalf of Defendant

REPORTED BY:

ELIZABETH A. HIGDON,  
CSR RPR  
Official Court Reporter

APPENDIX E

2

case which, your Honor, is not just a District  
Court opinion but went to the Fourth Circuit  
and was affirmed.

THE COURT: Affirmed without opinion?

MR. LONARDO: Per curiam.

THE COURT: Without a published opinion?

MR. LONARDO: With a published opinion.

THE COURT: With a published opinion?

MR. LONARDO: Yes.

MR. FLASKA: Not published.

MR. LONARDO: I am sorry, your Honor, two  
page opinion not published.

THE COURT: I thought it was unpublished.

MR. LONARDO: I am sorry. I think it is  
attached to our brief.

THE COURT: Thank you both very both.

I think this is a very interesting  
question and I would like to spend a lot more  
time working on it because I think it is very  
close. However, I think it is more important  
that we have a decision because I am sure  
whichever way I decide, one side or the other

is going to take it to the Court of Appeals. And, as I say, I think it is a very close question but I think I am prepared to rule and I will rule now.

The question arises about preemption provisions of the Federal Insecticide, Fungicide and Rodenticide Act or FIFRA. There are no disputed facts and we are here on cross motions for summary Judgment.

In 1986 the Village of Milford enacted an ordinance that regulated the use and application of pesticides in the following way. It required that any company that was coming in to use pesticides in Milford had to pay a \$15 fee, it had to register with the City of Milford, and it had to post a notice after the pesticide was sprayed to stay up for 72 hours saying in effect the pesticide has been put on and children and animals should keep off. That may be a little general but that is basically what the ordinance says. It says in effect, "Any person who applies or

causes pesticides to be applied shall pay the \$15 annual fee, shall file a statement with their name, address, telephone number, and the generic names of any pesticides to be used. They also must provide and place a yard marker containing the words 'chemically treated lawn -- and keep children and pets off for 72 hours.'" And the ordinance further prohibits property owners from removing the sign during the 72 hours.

Now it is the contention of the Plaintiff, Professional Lawn Care Association of America, that FIFRA has totally occupied this field and that these regulations of the Village of Milford are regulations of the use of pesticides, and because the federal government and FIFRA has totally occupied the field, given authorization to states to control but has specifically denied authorization to local areas, that an injunction should issue enjoining the implementation of the ordinance. It is the position of the Village of Milford,

and I am summarizing these very briefly, that FIFRA has entered this field and given the state authority to regulate pesticides, to regulate labeling and the like, but that this ordinance, which basically requires a \$15 annual fee, a posting and the filing of the name, address and telephone number and the like of the pesticide company, does not -- is not an area that was intended to be preempted by FIFRA, that this is an area of supplemental regulation, that it is not preempted and that there is not an intention for clear, complete regulation.

Now FIFRA, specifically 17 U.S.C. 136 and following, provides that the federal government and the states will participate in a pesticide regulatory effort, and the specific language of the statute in Section 136v(a) is that, "A State may regulate the sale or use of any federally registered pesticide or device in the State," and then they proceed to define state as a State, the

District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa. They stop there with those very specific definitions. Therefore, Plaintiff's position that Congress' intent was to preclude the exercise of any regulatory, any kind of regulatory authority by local political subdivisions such as Milford because that term was not included within the definition of state contained in the statute.

Now I think, first of all, that it is important to look at the legislative history because that is always helpful in determining what a statute means.

Basically the report of the Senate Agriculture Committee was that, "It is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving local authorities and political subdivisions of any and all



jurisdiction over pesticides and the regulation of pesticides." That is the Senate Agriculture Committee's report, reprinted in 1972 18 U.S. Code, Congressional and Administrative News, 3993 at 4008. Whereas the Commerce Committee Report, and this matter was a matter that was before both the Agriculture and Commerce Committees, the report of the Senate said, "The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA." 1972 Code, Congressional and Administrative News, 4092 at 4111.

The matter then went to a conference committee and a compromise substitute bill came out which did not contain any provision authorizing local regulations. In other words, the bill that came out was the one that had been presented by the Agriculture Committee not the Commerce Committee. When

the full Senate considered the bill after conference, of course the conference report was offered, and a statement was inserted into the Congressional Record stating that the amendments "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." Senator Allen on the floor made clear that the compromise did not include the Commerce Committee's amendment granting local governments authority to regulate pesticides.

Eventually the Conference Committee, leaving out the Senate Commerce Committee's amendment, was adopted, and both versions merely gave authority to the federal government and the states to regulate pesticides. As a matter of fact, there was no mention in the joint explanatory statement of the Conference Committee and the statute was eventually passed.

Subsequently, regulations were promulgated of the EPA and in 171.7(a) at 40 Federal Register 11700, it was specifically held, "It is not the intention of the Act 3 or these regulations to authorize political subdivisions below the state level to further regulate pesticides."

There are only two cases on this. One is the People ex rel Deukmejian v. County of Mendocino, 36 Cal3d 476, where the Court held that the term state should not be construed "to exclude agents of the enumerated party" such as local governments which are political subdivisions of the states. The other case is Maryland Pest Control v. Montgomery, 646 F.Supp 109, from the District of Maryland, which held that there was no authority for local units of government to make any regulations.

Now the Defendant City argues that there is no question but what the area of labeling and regulation of pesticides was preempted by

the statute but they argue this is not a regulation controlling pesticides or their use or labeling, that this is a different type, a police registration and posting requirement and was not of the kind that was intended to be preempted and that the power was there before and that the local communities still have it.

As I say, I think the case is a fairly close case but we start out with the fundamental proposition that Congress certainly possesses the power under the supremacy clause to preempt local as well as state laws, and that the preemption of local laws can take place in one of two ways. First, if Congress evidences an intent to occupy a given field, then any state law or local ordinance falling within that field is preempted. And, second, if the state law is in conflict with the federal statute, that there will be preemption there.

Now in this case the Congress clearly intended, in my opinion, to preempt this entire field and then it specifically gave states the right to operate within the field, and the rationale is one that can be rather easily understood. States and the federal government have the expertise to hire scientists, to do research, and to obtain the kind of information that is necessary for the purpose of determining what pesticides, insecticides, and the like are safe in the environment and which ones are not whereas local units of government generally, particularly small cities like Milford or any of the other small cities around the country, just don't have the facilities to do the kinds of work and research that is necessary.

Further, the other point that I think is important in looking at the rationale, looking at the statute and what it means, is the fact that if you allowed local governments to set up regulations in this field, you could have

300 different regulations in the State of Michigan, you could have every City coming up with a different plan, some could require postings for a week, others could require maybe the building of fences, the others could require policing, I mean all kinds of ordinances. If you say that they have got a right to do posting and they have got the right to take other actions like that that don't go directly to labeling of the types of pesticides, you could have 300 different regulations and certainly that is not rational. I think the analysis in Maryland Pesticide Control v. Montgomery, 646 F.Supp. 109, is excellent. I think it's on point and I think it is exhaustive. I think I will adopt that and I will grant the injunction of the Plaintiff.

You may present an order.

Thank you both very much.



## C E R T I F I C A T E

I, Elizabeth A. Higdon, Official Court Reporter, do hereby certify that I reported the proceedings in the above-entitled matter by means of stenography at the time and place hereinbefore set forth, and that the same was hereafter reduced to typewritten form under my supervision and that the said transcript is a true and accurate transcript or my stenographic notes.

Elizabeth A. Higdon /s/  
ELIZABETH A. HIGDON

CSR

DATED: October 18, 1989

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

\*\*\*

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PROFESSIONAL LAWN  
CARE ASSOCIATION OF  
AMERICA,

Plaintiff,

vs.

Case No. 89-CV-71439-DT  
Hon. Horace W. Gilmore

VILLAGE OF  
MILFORD,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT AND INJUNCTIVE  
RELIEF AND DENYING DEFENDANT'S CROSS  
MOTION FOR SUMMARY JUDGMENT

At a session of said Court held in the  
Federal Courthouse, City of Detroit,  
County of Wayne, State of Michigan on,

SEP 15 1989

PRESENT: HON: HORACE W. GILMORE  
U. S. District Court Judge

This matter having come before this Court upon Plaintiff's Motion for Summary Judgment and Injunctive Relief, and Defendant's Cross Motion for Summary Judgment, and the Court having reviewed the Briefs filed by the

APPENDIX F

parties in this matter and having heard oral argument from counsel for both parties;

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment be and hereby is granted for the reasons set forth on the record in open Court on August 24, 1989 and for the reasons set forth in Maryland Pest Control Association v. Montgomery County, 646 F.Supp. 109 (D. MD. 1986), affirmed, 822 F.2d 55 (C.A. 4, 1987).

IT IS FURTHER ORDERED that the Defendant, Village of Milford, Michigan is hereby enjoined from enforcing Village of Milford Ordinance 197 on the grounds that said Ordinance is preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§136 et seq.

IT IS FURTHER ORDERED that Defendant's Cross Motion for Summary Judgment is denied.

HORACE W. GILMORE  
U.S. District Court Judge

APPROVED AS TO FORM:

BY: Kenneth A. Flaska (P28605)  
Co-Counsel for Plaintiff

BY: Paul V. Groth (P37565)  
Co-Counsel for Defendant

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EASTERN DISTRICT OF MICHIGAN

/s/ \_\_\_\_\_  
DEPUTY CLERK

(4)  
No. 89-1905

Supreme Court, U.S.  
FILED

JUL 5 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WISCONSIN PUBLIC INTERVENOR, and TOWN OF  
CASEY,

Petitioners,

v.

RALPH MORTIER and  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF WISCONSIN

PAUL G. KENT,  
Counsel of Record, and  
RICHARD J. LEWANDOWSKI

DeWitt, Porter, Huggett,  
Schumacher & Morgan, S.C.  
2 East Mifflin Street, Suite 600  
Madison, WI 53703  
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## STATEMENT OF THE CASE

### Regulatory Background

Pesticide use is the subject of extensive federal regulation under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136, *et seq.* FIFRA requires that all pesticides be registered with the U.S. Environmental Protection Agency (EPA) and classified according to general or restricted use. (7 U.S.C. § 136a.) FIFRA also establishes a nationwide system for training and certifying pesticide applicators. (7 U.S.C. § 136b.) It is unlawful to use a pesticide which is not registered, to alter a pesticide, to use a pesticide contrary to label instructions or to engage in other acts prohibited by FIFRA. (7 U.S.C. § 136j.)

All of these requirements are enforced by EPA which has adopted extensive regulations governing

the sale and use of pesticides. 40 C.F.R. Subchapter E.

FIFRA specifies several roles for states. States which meet EPA standards may certify pesticide applicators under 7 U.S.C. § 136b. EPA may also enter into cooperative agreements with states to enable states to enforce FIFRA provisions. 7 U.S.C. §§ 136u and 136w-1. States may also regulate the sale and use of pesticides under 7 U.S.C. § 136v, except that states cannot permit what federal law prohibits.

In conformity with FIFRA, the Wisconsin Legislature has enacted extensive provisions regulating pesticides. Wis. Stat. §§ 94.67 - 94.71. These provisions are enforced by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) which has promulgated

administrative rules in Wis. Admin. Code Chs. Ag 29, Ag 161 and Ag 163.

### **The Town of Casey Ordinance**

The Town of Casey is a rural town with a population of 404 persons, located in the northwest corner of Wisconsin.<sup>1</sup> In 1983, the Town of Casey, with the assistance of the Wisconsin Public Intervenor, set out to develop a comprehensive pesticide control ordinance. The ordinance at issue, Ordinance 85-1, requires that a person submit a detailed application with respect to any pesticide use to the town board of the Town of Casey (Town Board) **at least 60 days prior** to the proposed use. Ordinance, § 1.3(1).<sup>2</sup>

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<sup>1</sup>Data from 1980 Census reported in the Washburn County Directory 1982-83 compiled by John L. Brown, County Clerk.

<sup>2</sup>A copy of the Ordinance is contained in Petitioners' Appendix, Vol. I, App. C.

Among other things, § 1.3(2) requires that the following information must be submitted with any permit application:

(d) an inventory of the pesticide(s) to be used listing the brand name, generic component ingredients, the quantities to be used, method of application, known benefits and known risks associated with the chemical(s) to be used;

(e) the chemical and non-chemical alternative methods or treatments available to accomplish the desired objectives and the reasons why the application of the proposed pesticide(s) is preferable to alternative chemicals and to other methods;

(f) the status of the proposed pesticide(s) and of any chemical alternatives in the federal Environmental Protection Agency's (EPA) pesticide reregistration program ...

(g) the positive and negative effect of reducing or eliminating the use of the proposed pesticide(s) and of any chemical alternatives;

(h) the anticipated impact of the application upon humans, animals and plants of the proposed pesticide(s) and of any chemical alternatives;

After an application is received, the Town Board has 15 days to make an initial determination on the application. The Town Board has discretion



to approve, condition or deny the request to use pesticides.

(3) Initial Determination by Town Board. ... The board may impose any reasonable conditions on a permitted application related to the protection of the health, safety and welfare of the residents of the Town of Casey. ...

Ordinance 85-1 § 1.3(3).

The applicant or any town resident may request a hearing before the Board on an initial determination, but the Town Board still retains the authority to approve, condition or deny the permit. § 1.3(5). Finally, a notice must be posted after any pesticide use. § 1.3(7).

Respondents brought a declaratory judgment action challenging the Town's Ordinance on the grounds that it was preempted by federal and state law. The Circuit Court for Washburn County, Wisconsin granted the relief requested and was upheld by the Wisconsin Supreme Court. *Mortier v.*

*Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990).<sup>3</sup>

### SUMMARY OF ARGUMENT

This case does not warrant review. The Wisconsin Supreme Court decision is consistent with the only federal circuit court decision on the issue. In addition, two other federal cases are presently pending before the Tenth and Sixth Circuits on the same issue. Thus, the alleged conflict is not significant nor ripe for review.

Moreover, the result of the Wisconsin Supreme Court was fair and correct. The court applied the proper legal standards in reaching its conclusion that

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<sup>3</sup>Respondent Ralph Mortier is an individual who was denied a license under the Town of Casey ordinance. Respondent, Wisconsin Forestry/Rights-of-Way/Turf Coalition is an unincorporated, non-profit association of individuals, businesses and other associations whose members use pesticides.

local law was preempted. This result precludes fragmented pesticide regulation by local units of government which are least able to address such complicated matters.

### ARGUMENT

#### I. THE CONFLICT ALLEGED IN THE PETITION IS NOT SIGNIFICANT AND IS NOT RIPE FOR REVIEW.

##### A. The Alleged Conflict Is Not Significant.

The Wisconsin Supreme Court decision in *Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990) holds that FIFRA preempts the local regulation of pesticides. This decision is in accordance with the only federal circuit court decision rendered to date, *Maryland Pest Control Association v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986) *aff'd*, 822 F.2d 55 (4th Cir. 1987). The Wisconsin Supreme Court decision is also in

accordance with the federal district court decision in *Professional Lawn Care Ass'n. v. Village of Milford*, Case No. 89-1439 (E.D. Mich., August 24, 1989); and the opinion of the court in *Long Island Pest Control Ass'n., Inc. v. Town of Huntington*, 72 Misc. 2d 1031, 341 N.Y.S. 2d 93 (1973).<sup>4</sup>

The Wisconsin Supreme Court is not in conflict with any federal circuit court opinions, and is consistent with the Fourth Circuit ruling. The only cases presenting an alleged conflict are decisions from the Supreme Courts of California and Maine and a decision from a federal district court in

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<sup>4</sup>In addition, the attorneys general from Maryland, 70 Op. Att'y Gen. 161 (Md. 1985); 73 Op. Att'y Gen. No. 88-006, (February 4, 1988); Oregon, 40 Op. Att'y Gen. 21 (Or. 1980); and Arkansas, Op. Att'y Gen. No. 89-212 (September 14, 1989) have reached the same result, as has the EPA, 40 Fed. Reg. 11697, 11700 (March 12, 1975).

Colorado.<sup>5</sup> A disagreement between state courts on a question of federal law should not warrant review in the absence of a conflict in the federal circuits.<sup>6</sup>

**B. The Minor Conflict Which Exists Is Not Ripe For Judicial Consideration.**

This Court has frequently noted that a conflict should be allowed to ripen before being given consideration by this Court. In *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950), Justice Frankfurter noted:

It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

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<sup>5</sup>*People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984); *Central Maine Power Company v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990), and *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989).

<sup>6</sup>Moreover, within days of the California Supreme Court decision, the California Legislature enacted a special provision expressly overturning the California Supreme Court ruling by preempting local pesticide regulations at the state level. See, 1984 Cal. Laws Ch. 1386 § 3.

This same concern was also noted by Justice Stevens in denying the Petition for Certiorari in *McCray v. New York*, 461 U.S. 961, 962 (1983):

I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system.

The admonition of Justice Stevens is particularly appropriate here. The only conflict in the federal system is between two federal district court opinions.<sup>7</sup> Both of these cases are presently on appeal to their respective circuits. Thus, within the next year, there will be two additional federal circuit court opinions on the issue presented by this case. If the decisions from the Tenth Circuit and Sixth

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<sup>7</sup>*Professional Lawn Care Ass'n. v. Village of Milford*, Case No. 89-1439 (E.D. Mich. August 24, 1989) Pet. App. IIE and *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989).



Circuit agree with the existing opinion from the Fourth Circuit and the Wisconsin Supreme Court, there will be no controversy for this Court to resolve. If these courts reach differing opinions, review can be considered at that time and in light of those decisions.

## II. THE WISCONSIN SUPREME COURT CORRECTLY APPLIED WELL-SETTLED FEDERAL PREEMPTION PRINCIPLES.

Contrary to Petitioners' arguments, the Wisconsin Supreme Court reached its decision based upon well settled principles of preemption.

### A. The Wisconsin Supreme Court Properly Used Legislative History.

The Wisconsin Supreme Court found that Congress preempted local regulation of pesticides based upon the statutory language of FIFRA as well as the legislative history. *Town of Casey*, 154 Wis. 2d at 24-31. As this court recently noted, "the question

whether a certain state action is preempted by federal law is one of congressional intent. "The purpose of Congress is the ultimate touchstone." *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). This Court has frequently utilized legislative history in determining whether there was Congressional intent to preempt state or federal laws. See, e.g., *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230-233 (1947); *Campbell v. Hussey*, 368 U.S. 297 301-302 (1961); and *Florida Avocado Growers v. Paul*, 373 U.S. 132, 147-48 (1963).

Moreover, there are numerous cases where this Court has found legislative history to be the most significant if not the determinative factor in finding preemption. *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 634 (1973); *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 410 (1983). For example, in *Philko*,

this Court interpreted federal statutory language concerning the transfers of title to aircraft. Although the statutory language did not speak to preemption directly or indirectly, this Court concluded that federal preemption was "dictated by the legislative history." 462 U.S. at 410.

Thus, the Wisconsin Supreme Court's conclusion that the statutory language of FIFRA in conjunction with the legislative history preempted local regulation, is a methodology well supported by existing precedent.

**B. The Wisconsin Supreme Court Properly Analyzed the Question of Local Preemption.**

Petitioners claim that the analysis used by the Wisconsin Supreme Court was improper because it allowed for preemption of local regulations while

state regulations were allowed to continue. This concern is misplaced.

First, local laws do not require a special preemption analysis. This Court has unequivocally stated that, "for the purposes of the supremacy clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

Second, there is nothing inappropriate or unusual about a Congressional scheme which preempts local regulation but leaves regulation at the state level intact. A situation very similar to the instant one was presented to the court in *Donelon v. New Orleans Terminal Company*, 474 F.2d 1108 (5th Cir. 1973). In that case, the Federal Railroad Safety Act provided for national railroad safety standards,

but allowed states to adopt additional or more stringent regulations. 45 U.S.C. § 434. The court held that while states could enact additional regulations, local governments were preempted from enacting such regulations. 474 F.2d at 1112.<sup>8</sup>

This is not an anomalous result. Clearly, Congress could have completely preempted the entire field of pesticide regulation and precluded any state role. Instead, Congress chose a scheme that is less intrusive on state rights. Under FIFRA, Congress provided for a continued state role in regulating pesticides and merely restricted local regulation. Such a scheme is consistent with the principles of

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<sup>8</sup>A similar analysis was applied under the Federal Railroad Safety Act by the courts in *Consolidated Rail Corporation v. Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987), and *Chesapeake and Ohio Railway v. City of Bridgman*, 669 F. Supp. 823 (W.D. Mich. 1987).

federalism and the Tenth Amendment with which Petitioners are concerned.

### **III. THE WISCONSIN SUPREME COURT REACHED A FAIR AND CORRECT RESULT.**

#### **A. The Court Properly Construed Legislative History.**

Although the statutory language of FIFRA indicates an intent to preempt local regulation of pesticides, this intent is expressed with even greater clarity in the legislative history. The House Committee on Agriculture noted:

The Committee [on Agriculture] rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 states and the federal government should provide an adequate number of regulatory jurisdictions.

H.R. 511, 92nd Cong., 1st Sess. 16 (1971).

Similarly, the Senate Agriculture Committee stated:

It is the intent that [7 U.S.C. § 136v] by not providing any authority to political subdivisions and other local authorities of or in the states, should be understood as depriving such local authorities and political subdivisions of any and



all jurisdiction and authority over pesticides and the regulation of pesticides.

1972 U.S. CODE CONG. & ADMIN. NEWS 3993, 4008.

Petitioners assert that there was legislative silence on the issue because the above statements were not directly expressed in the statutory language. Petitioners also suggest that there was a Congressional compromise resulting in the absence of such language. These arguments must be rejected.

As noted above, the fact that Congressional intent to prohibit local regulation was not expressed in the statutory language does not mean that Congress was silent on the issue. Nor does it mean that such statements cannot be utilized to determine Congressional intent.

Moreover, nothing in the undisputed legislative history shows that there was a "compromise" on the

local regulation issue. Three times amendments were proposed that would have authorized such regulation. Each time such attempts were defeated.<sup>9</sup> The result is not a compromise between allowing or prohibiting local regulation. The result is that the minority which argued for the preservation of local regulation lost.

**B. The Result of the Wisconsin Supreme Court Decision is Fair and Reasonable.**

Petitioners argue in favor of local regulation of pesticides, based on the assertion that there are serious gaps and deficiencies in state and federal law. Their solution to this problem is to place the highly technical and complex questions of pesticide regulations into the hands of the nearly 2,000 units of local government in Wisconsin as well as the local

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<sup>9</sup>This legislative history is set forth in detail in *Town of Casey*, 154 Wis. 2d at 25-28.

units of government in other states. Doing so would merely fragment pesticide regulation. While this problem would be burdensome for farms spanning multiple jurisdictions, it would render pesticide application almost impossible for railroads and utilities which use pesticides to keep hundreds of miles of rights of way clear of encroaching vegetation.

Moreover, public policy would be ill served by giving pesticide regulation to the level of government least well equipped to handle highly complex and technical questions regarding pesticide application and use. The town boards of small rural towns such as the Town of Casey simply do not have the technical expertise necessary to regulate pesticides on a nonarbitrary basis. Such decisions are best left to the states and the federal government.

If there are problems with the existing pesticide laws, the solution is to improve those laws at the state and federal level, not fragment regulation by giving it to the units of government least well equipped to deal with these issues.

**C. The Decision by the Wisconsin Supreme Court Does not Conflict With the Wellhead Protection Program of the Safe Drinking Water Act.**

Finally, Petitioners raise a new issue not presented to the Wisconsin courts, by claiming that the preemption of local regulations presents a conflict with the federal Wellhead Protection Program of the Safe Drinking Water Act. The preemption of independent local pesticide regulations does not in any way interfere with the Wellhead Protection Program of the Safe Drinking Water Act. The Wellhead Protection Program placed primary responsibility for implementing wellhead protection

measures with the states. 42 U.S.C. § 300h-7(a)(1). It is up to the states to specify the duties of state agencies and local government entities. Local governments are not given unfettered rights to independently regulate pesticides or other substances entering wellhead areas. Any local program must be developed as a part of the state program.

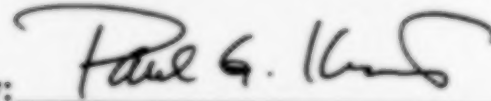
Allowing local implementation of a state program is entirely different than the situation before the Wisconsin Supreme Court. The Town of Casey was not acting in accordance with or pursuant to a state program. To the contrary, it enacted its own independent set of regulations and an independent permitting program. To preclude the independent regulation of pesticides does not interfere with cooperative arrangements between states and local units of government with respect to the Wellhead Protection Program.

### CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Dated this 3rd day of July, 1990.

DeWitt, Porter, Huggett,  
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FILED

AUG 15 1990

JOSEPH P. SPANGL, JR.  
CLERK

No. 89-1905

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

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WISCONSIN PUBLIC INTERVENOR, and TOWN OF  
CASEY,

Petitioners,

v.

RALPH MORTIER and  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION,

Respondents.

---

SUPPLEMENTARY BRIEF AND APPENDIX  
FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF WISCONSIN

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## ARGUMENT

This Supplemental Brief is filed in accordance with Rule 15.7 of the Rules of the Supreme Court of the United States, in order to call the Court's attention to a new opinion. A copy of the new opinion is attached.

On August 1, 1990, the United States Court of Appeals for the Sixth Circuit filed its decision in *Professional Lawn Care Association v. Village of Milford*, Case No. 89-2141 (6th Cir. 1990). The opinion is recommended for publication. This opinion was not available on July 5, 1990 when the Respondent filed its Brief in Opposition to Petition for Writ of Certiorari, regarding *Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990).

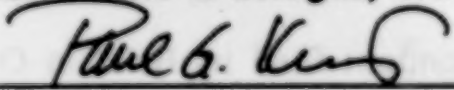
The Sixth Circuit's *Professional Lawn Care* decision upheld the district court's decision that the

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempts the local regulation of pesticides. It is in accordance with the Wisconsin Supreme Court decision in *Mortier* and the only other federal circuit court decision rendered to date, *Maryland Pest Control Ass'n. v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986) *aff'd.*, 822 F.2d 55 (4th Cir. 1987).

The Sixth Circuit's decision further demonstrates that review of the *Mortier* decision by this Court is not necessary.

Dated this 13th day of August, 1990.

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# APPENDIX

No. 89-2141

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROFESSIONAL LAWN CARE  
ASSOCIATION,

*Plaintiff-Appellee,*

v.

VILLAGE OF MILFORD,

*Defendant-Appellant.*

On Appeal from the  
United States District  
Court for the Eastern  
District of Michigan

Decided and Filed August 1, 1990

Before: MILBURN and NELSON, Circuit  
Judges; and ENGEL, Senior Circuit Judge.

MILBURN, Circuit Judge, delivered the opinion of the court, in which ENGEL, Senior Circuit Judge, joined. NELSON, Circuit Judge, (pp. 13-26 delivered a separate concurring opinion.

MILBURN, Circuit Judge. The defendant-appellant, Village of Milford, Michigan, enacted Ordinance No. 197, which imposes a registration, posting and notice requirements upon commercial "users of pesticides." The district court enjoined the village from enforcing the ordinance on the ground

that it was impliedly preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. The village then filed this timely appeal. For the reasons that follow, we affirm.

I.

A.

Defendant-appellant Village of Milford is a political subdivision of the State of Michigan. Plaintiff-appellee Professional Lawn Care Association of America is a national organization that represents approximately 1,400 commercial lawn care companies, including seven that are located in the village.

On January 27, 1986, the village enacted Ordinance No. 197, entitled

AN ORDINANCE TO PROVIDE FOR THE PUBLIC HEALTH AND SAFETY BY REQUIRING REGISTRATION OF PERSONS APPLYING PESTICIDES FOR HIRE WITHIN THE VILLAGE OF MILFORD AND PUBLIC NOTICE OF THE USE OF PESTICIDES; TO PROVIDE THE PUBLIC THE OPPORTUNITY OF AVOIDING CONTACT WITH THESE PESTICIDES; AND TO IDENTIFY THE LOCATION OF FLAMMABLE PESTICIDES.

The ordinance defines a "user of pesticide" as:

(1) Any person who applies or causes pesticides to be applied to property by any means where such person is engaged in applying pesticides for

hire to trees, lawns, shrubs, plants, or the atmosphere; or

(2) Any person who applies or causes pesticides to be applied in commercial businesses and public buildings.

The ordinance requires all users of pesticides who use and apply pesticides for hire within the village to register with the village and pay an annual registration fee of \$ 15.00. Users of pesticides who store, mix or otherwise handle pesticides within the village must provide the village fire department with a copy of their registration forms.

The ordinance requires users who apply pesticides to commercial businesses or public buildings to supply the building operators with decals that indicate the date the pesticides were applied. The decals must be posted at the building entrances until the time of the next application or ninety days, whichever occurs first.

Village residents whose physicians declare them to be "sensitive" to pesticides may, for an annual fee of \$ 15.00, be placed upon the village's list of chemically sensitive residents. The village updates the list monthly. The ordinance requires all commercial users of pesticides to obtain current copies of the list and to notify the chemically sensitive residents at least twenty-four hours in advance of an outdoor application. The ordinance permits written notice where oral notice is not possible. In addition, users of pesticides must also place yard markers containing the words "Chemically Treated Lawn - Keep Children and Pets Off for 72



Hours" on the property where an outdoor application has been made. The ordinance provides that violations of its terms shall be penalized by assessments of fines ranging from \$ 25 to \$ 100, depending upon the number and type of violations.

The association initiated this action by filing a complaint seeking declaratory and injunctive relief on May 5, 1989. The association alleged that FIFRA preempts the local regulation of pesticides, such as Ordinance No. 15. The village answered the complaint on June 5, 1989, and soon thereafter the parties filed cross-motions for summary judgment.

On August 24, 1989, in a ruling from the bench, the district court granted the association's motion for summary judgment and enjoined the village from enforcing Ordinance No. 197. The district court filed an order memorializing its decision on September 15, 1989.

#### B.

FIFRA was originally enacted in 1947 as a pesticide labeling statute. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). In 1972, in response to concerns about the safety of pesticide use, and "because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest," *Id.* at 991-92, Congress rewrote FIFRA through amendments that transformed it into a comprehensive regulatory statute. See *Id.* As amended, FIFRA "establishe[d] an elaborate framework for the regulation of pesticide use in the United States." *Love v. Thomas*,

858 F.2d 1347, 1350 (9th Cir. 1988), *cert. denied*; 109 S. Ct. 1932 (1989); see also *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1296 (8th Cir. 1989).

FIFRA contemplates various levels of interaction between the federal, state and local governments in the regulation of pesticides and their use. FIFRA defines a "state" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." 7 U.S.C. § 136(aa). FIFRA does not define "political subdivisions" or "local authorities." Some sections of FIFRA, however, refer explicitly to "political subdivisions" and "local agencies" as distinct from "states." See 7 U.S.C. §§ 136f(b); 136r(b); 136t(b).

FIFRA expressly permits states to regulate the use of federally registered pesticides, "but only if and to the extent the regulation does not permit any sale or use prohibited by" the federal statute. 7 U.S.C. § 136v<sup>1</sup>. FIFRA does not contain any provisions that

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<sup>1</sup>§ 136v Authority of States

#### (a) In general

A state may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(continued...)

authorize or prohibit political subdivisions or local authorities from regulating pesticides or their use.

Pursuant to the grant in section 136v, the State of Michigan enacted the Pesticide Control Act of 1976. Mich. Comp. Laws Ann. §§ 286.551 - .581. The state largely adopted the federal standards, including FIFRA's certification standards for commercial applicators of pesticides. As a result, commercial pesticide applicators are subject to extensive federal and state regulation in Michigan.

In making its decision, the district court turned first to FIFRA's legislative history, which reveals that the pesticide legislation President Nixon proposed in 1971 included provisions that expressly gave local governments the power to regulate pesticides and their use. However, nearly every congressional committee that passed on the proposed legislation deleted those provisions in the belief that the state and the federal governments could regulate pesticides adequately without subjecting the pesticide industry to thousands of regulatory jurisdictions. See *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 646 F. Supp. 109, 111-13 (D. Md. 1986), *aff'd without published opinion*, 822 F.2d 55 (4th Cir. 1987), *further related proceedings*, 884 F.2d 160 (4th Cir. 1989) (*per curiam*) ("*Maryland Pest Control*"). As a result, the

legislation that Congress enacted contained no provisions granting local governments the power to regulate pesticides and their use. The district court concluded that when Congress amended FIFRA in 1972, it occupied the entire field of the regulation of pesticides "and then it specifically gave states and not their political subdivisions] the right to operate within the field . . . ." J.A. 33.

The district court also noted that the question of the preemption of local regulations of pesticides and their use had been decided in two reported opinions, with each court reaching different results. The United States District Court for the District of Maryland found a county ordinance nearly identical to the village's to be preempted in *Maryland Pest Control*, while the California Supreme Court found a voter-enacted ban on the aerial application of certain pesticides not to be preempted. See *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984) ("*Mendocino County*").<sup>2</sup> The district court adopted the analysis in *Maryland Pest Control* and concluded that FIFRA preempted Ordinance No. 197.

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<sup>1</sup>(...continued)

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

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<sup>2</sup>The Wisconsin Supreme Court recently followed *Maryland Pest Control*, see *Mortier v. Town of Casey*, 154 Wis.2d 18, 452 N.W.2d 555 (1990), while the Supreme Judicial Court of Maine recently followed *Mendocino County*, see *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990).



## II.

## A.

In determining whether Congress has exercised its power to preempt state or local regulations, we give primary emphasis to ascertaining the congressional intent underlying the statute in question. See *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina*, 479 U.S. 130, 140 (1986). Congress may preempt a state or local law expressly or by passing a statute that is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary . . . regulation." *Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where the federal statute is not so large that it occupies the entire field, state and local law may still be preempted where it conflicts with the federal law by standing as an obstacle to Congress' purposes, see *Schneidewind v. ANR Pipeline Co.*, 489 U.S. 293, 108 S.Ct. 1145, 1151 (1989), or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state [or local] laws on the same subject." *Hillsborough County*, 471 U.S. at 713 (quoting *Rice*, 331 U.S. at 230).

Absent express language to the contrary, there is ordinarily a presumption against preemption, *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), especially when the challenged state or local regulation concerns state or local health and safety matters. See *Hillsborough County*, 471 U.S. at 715.

However, the failure of a federal statute to speak directly to preemption does not necessarily create a gap for state or local regulation. See *Adams Fruit Co. v. Barrett*, 110 S.Ct. 1384, 1390-91 (1990).

## B.

The village claims that the district court's analysis was off-target because Ordinance No. 197 does not regulate pesticides or their use, but is merely a "public notice regulation" designed to protect the health and safety of village residents. We cannot agree because the unambiguous language of the ordinance imposes requirements that pesticide users must fulfill, and practices they must follow, before and after applying pesticides. By its plain terms, the ordinance regulates "users of pesticides," the application of pesticides, and conduct that concerns the application and use of pesticides.<sup>3</sup> Therefore, we conclude that Ordinance No. 197 is an attempt by a local government to regulate pesticides and their use. See *Maryland Pest Control*, 646 F.

<sup>3</sup>Determination of the meaning of a statute begins with the plain language of the statute itself. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 1030 (1989); *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988). Because "use" and "apply" are not defined by the ordinance, we interpret them "as taking their ordinary, contemporary, common meaning[s]." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Definitions of "apply" include "to put to use especially for some practical purpose" and "to . . . lay or spread on," *Webster's Third New International Dictionary* 105 (1981), while definitions of the noun "use" include "a method or manner of using something" and "the privilege or benefit of using something." *Id.* at 2523.



Supp. at 113; see also *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 117 (2d Cir. 1989) (state public notice requirement held to be a permissible sale and use regulation).

### C.

FIFRA does not preempt the village ordinance by its express terms, which leaves resolution of this issue to a determination of whether Congress has preempted local regulation by implication. We are urged by the parties to join with the Wisconsin Supreme Court in adopting the rationale of *Maryland Pest Control*, see *Mortier v. Town of Casey*, 154 Wis.2d 18, 452 N.W.2d 555 (1990), or to adopt the opposing view and join the Supreme Judicial Court of Maine in following *Mendocino County*, see *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990).

In *Mendocino County*, the California Supreme Court found that because FIFRA contemplates various levels of state and local interaction, Congress did not occupy the entire field, but merely joined the state and local governments in pesticide regulation. The court emphasized FIFRA's failure to limit the states' ability to delegate their authority to political subdivisions and the traditional regulatory powers of state and local governments.<sup>4</sup> The court concluded

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<sup>4</sup>Notably, a year after *Mendocino County* was decided, the United States Supreme Court held that Congress could control the states and regulate in areas that were previously thought to be insulated from a federal regulation because they were  
(continued...)

that as political subdivisions of states, local governments could regulate pesticide use. The court also reviewed FIFRA's legislative history and failed to find any express indications that Congress intended to deny local governments the power to regulate pesticide use.

In *Maryland Pest Control*, the district court concluded that through the 1972 amendments to FIFRA, Congress intended to enact, and did enact, a comprehensive statute that occupied the field of pesticide regulation. 646 F. Supp. at 110. The court found that by its terms, FIFRA opened specific portions of the field to state regulation and much smaller portions to local regulation. *Id.* at 111. The district court concluded that if it were to ignore the distinctions Congress drew between states and their political subdivisions, it would needlessly render vast portions of the statute superfluous and ignore Congress' intent to erect a broad federal regulatory framework. *Id.* The district court also found that legislative history demonstrated that both houses of Congress specifically considered, and specifically rejected, President Nixon's proposed provisions that would have allowed for local regulation of pesticides and their use. *Id.* at 111-113.

Our analysis of FIFRA and its legislative history leads us to conclude that when Congress rewrote the statute, it impliedly preempted the local

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<sup>4</sup>(...continued)

"traditional" areas of state and local control. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985).

regulation of pesticides, including Ordinance No. 197. It is well-established that the starting point in preemption analysis is congressional intent, and it is undisputed that the intent behind the 1972 amendments was to enact sweeping federal pesticide regulation. Congress transformed FIFRA into a statute that cast a regulatory net over pesticides and their use, in part by giving the EPA enforcement authority over the use, sale and labeling of pesticides. When seen in this context, the *Mendocino County* view that Congress only entered the field of pesticide regulation already occupied by state and local governments is, at best, strikingly inconsistent with the undisputed legislative intent.

Moreover, *Mendocino County* ignores the distinctions Congress drew in the express terms of the legislation. FIFRA contains several provisions that expressly refer to political subdivisions and local authorities as distinct from state governments and agencies. Additionally, Congress did not include political subdivisions in its definition of "states." See 7 U.S.C. § 136(aa). Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); see also *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197 (6th Cir. 1983). ("It is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in

another part reflects a congressional intent that the exclusion was not inadvertent.").

State law is preempted where it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind*, 485 U.S. at \_\_\_, 108 S.Ct. at 1151. As the district court pointed out, adoption of the *Mendocino County* view would allow the uniformity and comprehensiveness Congress sought to establish through FIFRA to be lost in the muddle of thousands of local standards and regulations. FIFRA would no longer stand as a sweeping federal regulatory framework but would become the lowest common denominator in an equation of infinite variables.

Courts need only to examine the legislative history of a statute when its terms are ambiguous or where enforcement of the plain terms of the statute would "produce a result demonstrably at odds with the intention of [the statute's] drafters." *Ron Pair Enterprises*, 109 S. Ct. at 1031 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). In this case, the district court reviewed the legislative history of the 1972 amendments and adopted the analysis in *Maryland Pest Control*. We, too, agree with the *Maryland Pest Control* analysis, and also with Judge Kaus, who dissented from *Mendocino County* in part because he found the decision was "based on an untenable reading of the legislative record." *Mendocino County*, 683 P.2d at \_\_ (Kaus, J., dissenting). The lengthy history of the 1972 amendments to FIFRA demonstrates that both houses of Congress positively rejected President Nixon's proposal that local governments be permitted



to regulate pesticides and their use. In addition, as noted in *Maryland Pest Control*, several of the committee reports explicitly stated an intent to deprive local authorities of the power to regulate pesticide use. See *Maryland Pest Control*, 646 F. Supp. at 112-13.

### III.

In the absence of explicit statutory language, there is a presumption against the preemption of local police powers. See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). However, that presumption does not stand un rebutted merely because Congress failed to include a provision that expressly preempted state law. See *Adams Fruit Company v. Barrett*, 110 S. Ct. 1384, 1390-91 (1990). In this case, the presumption against preemption is overcome because FIFRA, as amended in 1972 and thereafter, is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary . . . regulation." *Hillsborough County*, 471 U.S. at 713. Moreover, the statutory language and the fundamental rules of statutory interpretation make it clear that Congress intentionally omitted states' political subdivisions from the section 136v grant of authority to regulate pesticides, and the legislative history demonstrates that Congress positively rejected the proposal to make room for local governments in the field of pesticide regulation.

Accordingly, for the foregoing reasons, the judgment of the district court is **AFFIRMED**.

DAVID A. NELSON, Circuit Judge, concurring. The starting point in any analysis of the preemptive effect of an Act of Congress, it seems to me, must be the language of the act itself. The language of the act that is before us in this case manifests a clear intent not to preempt all state regulation of the use of pesticides. State regulation is often effected through locally adopted ordinances, of course, and insofar as the type of pesticide regulation at issue here is concerned, the statutory language does not necessarily indicate that Congress intended to rule out ordinances adopted by state political subdivisions pursuant to authority conferred by state statute or state constitutional provision.

The legislative history, on the other hand, suggests about as strongly as it possibly could that Congress did indeed intend to keep the field of pesticide regulation clear of local ordinances. I would have felt more comfortable about carrying out this intent if Congress had done a better job of writing it into the law. I conclude, however, as the other members of the panel have done, that the Village of Milford's ordinance cannot be permitted to stand. I write separately because my reasoning differs somewhat from that of my colleagues and because this case presents an important question the proper resolution of which is by no means free of doubt.

### I.

The Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 89 Stat. 973, amended the Federal Insecticide, Fungicide and Rodenticide Act (now codified at 7 U.S.C. §§ 136 et



seq.) to create a comprehensive system for regulating both interstate and intrastate distribution and use of pesticides. The 1972 legislation was not intended to occupy the field totally; in its present form, § 24(a) of the Act expressly declares that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act. . . ." 7 U.S.C. § 136v(a).

For purposes of the Act, the term "State" is defined as meaning what it says - "a State" - plus the District of Columbia and Puerto Rico, along with the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa. Section 2(aa) of the Act, 7 U.S.C. § 136(aa).<sup>1</sup> The statutory definition does not, on its face, exclude a state's political subdivisions.

In declaring that "[a] State may regulate the sale or use of any federally registered pesticide," similarly, § 24 of the Act says nothing about the agency or agencies through which the power of the state may be exercised. There is a sharp contrast, in

<sup>1</sup>In a letter sent to the Chairman of the Senate Commerce Committee before enactment of the legislation, the General Counsel of the Treasury Department, Mr. Samuel Pierce, pointed out that this definition "would extend the coverage of the Act to a geographical area greater than that comprising the Customs territory of the United States . . . ." S.Rep. No. 516, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4092, 4129. Mr. Pierce recommended a definition confined to the several states, the District of Columbia, and Puerto Rico, but his recommendation was not adopted.

this respect, between § 24 and § 4(a)(2), a section dealing with certification of competency in pesticide use and handling. The latter section, as currently codified at 7 U.S.C. § 136i(a)(2), provides in part as follows:

If any State, at any time, desires to certify applicators of pesticides, the Governor of such State shall submit a State plan for such purpose. The Administrator shall approve the plan submitted by any State, or any modification thereof, if such plan in his judgment -

(a) designates a State agency as the agency responsible for administering the plan throughout the State . . . ." (Emphasis supplied.)

The Act imposes no corresponding requirements with respect to the type of regulations at issue in this case, which involve registration and notice but do not involve competency certification. Absent any such requirements, it would not be unreasonable to suppose that states are free to exercise their power outside the area of competency certification through whatever mechanism might seem most expedient to them.

Municipal bodies are "essentially creatures of the state." *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 507 (6th Cir. 1986) (Engel, J., concurring). They are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them." *Kelley v. Board of Educ. of Nashville & Davidson County*, 836 F.2d 986, 994 (6th Cir. 1987) (quoting *Hunter v. Pittsburgh*, 207 U.S.

161, 178 (1907)), *cert. denied*, 487 U.S. 1206 (1988). If the State of Michigan has retained the power to impose registration and notice requirements on commercial users of pesticides, therefore, one would normally assume that the state could authorize the exercise of that power through whatever political subdivision it wished.

It is undisputed that under the "home rule" provisions of the Michigan constitution, the Village of Milford has sweeping power to adopt ordinances relating to public health and other matters of municipal concern. See Mich. Const., Art. VII, § 22. When the predecessor of Michigan's current constitution was adopted in 1908, "very broad, general powers of government were consigned to those units of government likely to be best informed of local needs and best able to satisfy them . . . ." *Dooley v. City of Detroit*, 370 Mich. 194, 121 N.W.2d 724, 730 (1963). That allocation of powers was continued when Michigan's current constitution was adopted in 1963 - and villages were among the units of government to which very broad powers were assigned. Incorporated villages, the Michigan legislature has confirmed, possess the authority to pass such ordinances as they may deem proper to "preserve the public health," among other things, and to "make such other regulations for the safety and good government of the village and the general welfare of its inhabitants as are not inconsistent with the general laws . . . ." Mich. Comp. Laws § 67.1. See also Michigan's "Village Home Rule Act," Mich. Comp. Laws §§ 78.1 et seq.

Because the State of Michigan has thus clearly authorized ordinances such as that enacted by the Village of Milford, there is a very real sense in which the Milford ordinance represents "state" action within the territorial limits of the village. The results of this state action are no different in kind from those that would have been produced had Michigan chosen to regulate pesticide usage in the village through a statute passed directly by the legislature and signed by the governor. It is true that municipalities are not specifically mentioned in the definition section of the Pesticide Control Act, but state governors and state legislatures are not specifically mentioned in that section either.

There are three sections of the Pesticide Control Act in which Congress did refer specifically to political subdivisions or local agencies. It has been argued, therefore, that "when Congress intended that local governments play a role in [the Act's] regulatory scheme, it specifically said so." *Maryland Pest Control Ass'n v. Montgomery County*, 646 F.Supp. 109, 111 (D.Md. 1986) (quoting 70 Ops. Atty. Gen. Md. 161 (1985)), *aff'd*, 822 F.2d 55 (4th Cir. 1987) (unpublished op.). The argument, it seems to me, is not persuasive.

The first section of the Act to refer specifically to political subdivisions is § 8 (7 U.S.C. § 136f), which deals with the maintenance and inspection of books and records. Section 8(a) authorizes the Administrator of the Environmental Protection Agency to require pesticide manufacturers to maintain records of their operations, and § 8(b) says that manufacturers shall produce such records for



inspection "upon request of any officer or employee of the Environmental Protection Agency or of any State or political subdivision, duly designated by the Administrator . . . ." 7 U.S.C. § 136f(b) (emphasis supplied). The authority of the EPA Administrator to designate such officials is conferred by § 23(a) of the Act, which authorizes the Administrator to enter into cooperative agreements with "States" to "delegate to any State the authority to cooperate in the enforcement of the Act through the use of its personnel . . . ." 7 U.S.C. § 136u(a) (emphasis supplied).<sup>2</sup> Section 23 of the Act necessarily uses the word "State" to include political subdivisions, for it would not otherwise be appropriate to speak of political subdivisions in § 8. And if "State" includes political subdivisions in § 23 of the Act, it can hardly be a forgone conclusion that "State" does not include political subdivisions in § 24 of the Act as well.

The next section of the Act to refer specifically to political subdivisions is § 20 (7 U.S.C. § 136r), which mandates cooperation with local agencies in connection with research and monitoring. Section 20(b) directs the Administrator to formulate a national plan, "in connection with other Federal, State or local agencies," for monitoring pesticides. Section 20(c) directs the Administrator to undertake monitoring activities, again in cooperation with other federal, state or local agencies.

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<sup>2</sup>This section was amended in 1978 to include Indian tribes as well as states. Pub. L. No. 95-396, § 21, 92 Stat. 834 (1978).

Section 22(b), finally, contains a more generalized directive for the Administrator to cooperate with local agencies, *inter al.*:

The Administrator shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this Act, and in securing uniformity of regulations. 7 U.S.C. § 136t(b).

These statutory directives for the Administrator to cooperate with appropriate local officials and political subdivisions shed little or no light on the question whether pesticides may be regulated by local ordinance. A mandate for the Administrator to cooperate with political subdivisions is certainly no less consistent with the conclusion that states may confer a regulatory role on their political subdivisions than it is with the conclusion that they may not.

## II.

If the Act itself does not plainly show that Congress intended to preclude states from regulating through their political subdivisions, the amendments, committee reports and floor debates comprising the legislative history of the enactment demonstrate almost conclusively, I believe, that those who were most knowledgeable about this piece of legislation, and who had the greatest responsibility for shaping its terms, understood that it was designated to do precisely that. Most Members of Congress, to be sure, probably never focused on the issue at all. The Members on whom the rank and file were relying to hammer out an acceptable bill did focus on the issue,



however, and evidently made a conscious decision that regulation by political subdivisions should be preempted. That decision was not solely the work of anonymous staffers, and it was not slipped into the legislative history at the last minute - or, as sometimes happens, after the last minute. The decision was made well in advance of enactment of the legislation, it was known to and accepted by the members of the responsible committees, and it was openly explained prior to enactment.

President Nixon's original proposal for the legislation that became the 1972 Pesticide Control Act said explicitly that "nothing in this Act shall be construed as limiting the authority of a State *or a political subdivision thereof* to regulate the sale or use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited under authority of the Act." H.R. 4152, 92d Cong., 1st Sess. § 19(c)c (1971), as quoted in *Maryland Pest Control Ass'n*, 646 F.Supp. at 111-112. (Emphasis supplied.) The House Agriculture Committee, which was the first committee to report the legislation out, not only deleted this reference to political subdivisions,<sup>3</sup> but would also have prohibited the states themselves from restricting the use of any pesticide that the Administrator of the EPA had registered with a "general use" classification:

<sup>3</sup>The accompanying report explained that "The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971).

A State may regulate the sale or use of any pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act *or restrict by license or permit the use of a pesticide registered for general use.* § 24(a) of H.R. 10729, 92d Cong., 1st Sess., 117 Cong. Rec. 40,027 (1971). (Emphasis supplied.)

In the ensuing debate on the House floor, Congressman Dow offered a substitute bill containing six amendments, the last of which dealt with § 24(a). Congressman Dow did not propose to restore the language authorizing regulation by political subdivisions; he simply proposed striking the prohibition against states going further than the federal government in restricting pesticides registered for general use. 117 Cong. Rec. 40,034 (1971). Mr. Dow noted that state officials from ten states, including Michigan, had expressed "opposition to the preemption of State authority authorized by section 24." *Id.* at 40,035. No such opposition was noted with regard to the change the Agriculture Committee had made concerning political subdivisions.

The Dow substitute was ultimately defeated, but on motion of Congressman Kyl, and with the support of Chairman Poage of the Agriculture Committee, § 24(a) was amended on the House floor to drop the restriction to which Congressman Dow and others had objected. *Id.* at 40,065. The amended version of that bill - which reflected a number of changes made in committee, as well as the one change made on the House floor - was hailed as "the compromise product of environmentalists, farm

groups, State and Federal officials, the chemical industry, and the public." *Id.*, remarks of Congressman Sebelius.

On the Senate side the legislation was considered first by the Committee of Agriculture and Forestry and then by the Commerce Committee. 118 Cong. Rec. 32,251 (1972). Under date of June 7, 1972, the former committee issued a report containing this highly instructive passage:

*The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." S.Rep.No. 838, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4008. (Emphasis supplied.)*

The Senate Commerce Committee disagreed with the Agriculture Committee on this and a

number of other issues. The Commerce Committee adopted 15 sets of amendments to the Agriculture Committee's version of the bill, one of which (Amendment No. 10) was explained thus in a report issued by the Commerce Committee under date of July 19, 1972:

*Authority of Local Governments to Regulate the Use of Pesticides*

The amendment gives local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities.

While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA.

The amended language would prohibit local governments from imposing requirements as to labeling and packaging which differ from those imposed by Federal and State authorities. Localities would therefore be preempted from regulating the composition of any pesticide. Local governments could, however, prohibit or restrict the sale or use of pesticides within their jurisdiction. As manufacturers will not be forced to formulate different variations of the same pesticide to meet local needs, no unreasonable



burdens on commerce are anticipated. Nor are burdens on the environment, since localities could not permit sales or uses prohibited by State and Federal authorities. S.Rep.No. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4092, 4111-12.

After issuance of this report, the two committees and their staffs engaged in extensive negotiations and ultimately worked out a compromise bill. 118 Cong. Rec. 32,251 (1972). The compromise - which was supported by all of the members of the Agriculture Committee and a majority of the members of the Commerce Committee, including Senator Hart of Michigan, *Id.* at 32,252 - incorporated nine of the Commerce Committee changes, with modifications, but did not include Amendment No. 10. An explanation of the compromise printed in the Congressional Record for September 26, 1972, described the amendments that had been adopted and noted that "Commerce Committee amendments . . . 10 (authority of local governments to regulate the use of pesticides) . . . are not included in the substitute." *Id.* at 32,258.

Senator Hart inserted a statement in the record supporting the compromise. *Id.* at 32,258. Several of Senator Hart's colleagues took note of the long hours he personally had spent on the legislation. *Id.* at 32,259-60.

Senator Allen, the Agriculture subcommittee chairman responsible for the management of the bill on the floor, expressed himself on the compromise as follows:

The package of amendments now before us reflect a reasonable compromise agreement between the Agriculture Committee and the Commerce Committee. Each participant in this agreement may have some reservations about particular provisions that have been added or about particular provisions that have been deleted.

No one should have any doubt, however, that this agreement marks a major and significant improvement over present authority to control pesticides. No one should have any doubts about the concern for environmental quality which is expressed in this bill with the addition of the Agriculture/Commerce package of amendments. *Id.* at 32,260.

The Senate passed the compromise by a vote of 71 to 0. *Id.* at 32,263. Section 24 was exactly the same in both the Senate and House bills, and no changes were made in that section when the bills went to the conference committee. The conference report was passed by both houses without further discussion of the regulatory authority of local governments. The view of the House and Senate Agriculture Committees on that issue prevailed, and the view of the administration and the Senate Commerce Committee did not.

The appellants in this case argue that because the dispute over preemption of local regulatory authority was compromised by not specifically referring to this subject in the statute, the compromise was not designed to preempt traditional local police powers or to preempt the power of a state to distribute its regulatory authority between



itself and its political subdivisions in any way it might see fit. (See *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150, 1160-61 (1984), for a succinct statement of this position.) The argument might have been persuasive if the compromise had been limited to the local government issue, but such was not the case. There were numerous points of disagreement between the Senate committees, for example, and the compromise reached in the Senate was based on the Agriculture Committee's receding on some issues and the Commerce Committee's receding on others. The local government question was one on which the Commerce Committee gave way to the Agriculture Committee entirely, and when the Senate passed the compromise bill, it passed a bill that the Commerce Committee had said, in its June 7 report, "should be understood as depriving . . . local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides."

When the House passed its version of the legislation, similarly, it adopted a compromise in which language preserving local regulatory authority had been deleted, as had language curtailing the regulatory authority of the states qua states with respect to general use pesticides. The House Agriculture Committee's announced intention in deleting the local government language was to limit the number of "regulatory jurisdictions" to "the 50 States [plus Puerto Rico, etc.] and the Federal Government." It was the House Committee's version that the Senate ultimately adopted, and the report of the Senate Agriculture Committee specifically

endorsed "the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides . . . ." As Judge Motz observed in *Maryland Pest Control*, 646 F.Supp. at 111, "the legislative history could not be more clear."

### III.

But no matter how clear the legislative history may be, legislative history, as such, is not statutory law. "While we have frequently said that pre-emption analysis requires ascertaining congressional intent," the Supreme Court has noted, ". . . we have never meant that to signify Congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text." *Puerto Rico Dept. of Consumers Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). "[L]egislative intention, without more, is not legislation." *Train v. City of New York*, 420 U.S. 35, 45 (1975).

The Constitution itself shows that committee reports and other such indicia of Congressional intent must not be allowed to supplant the text of the statute. To become law, after all, a bill must have passed the House of Representatives as a whole, and not merely one or more House committees. U.S. Const., Art. I, § 7. It must have passed the Senate as a whole, and not merely one or more Senate committees. And "before it becomes a Law," a bill which has passed both the House and the Senate "shall be presented to the President of the United States." *Id.* The President may then veto the bill, in which case, unless each House overrides

the veto by two-thirds vote, the bill "shall not be a Law." *Id.* Be it ever so clear, therefore, a committee report that has not passed both the House and the Senate and that has not been presented to the President cannot possibly be a "Law" within the meaning of the Constitution.

Still, the Supreme Court has long acknowledged that "[r]eports to Congress accompanying the introduction of proposed law may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). We are bound by the text of the statute, and where the proper interpretation of the enacted statutory text is "doubtful," resort to *bona fide* legislative history is always permissible and may sometimes be helpful.

What of the statute before us here; is its interpretation really doubtful? Doubtful enough, in my view.

The district court evidently believed that the system of pesticide regulation adopted in the Pesticide Control Act was so comprehensive that courts would have treated the entire field as having been occupied by the federal government absent the express disclaimer contained in § 24 of the Act. I am inclined to agree. Unless the affirmative grant of permission for "a State" to regulate pesticide use is properly interpreted as extending in one way or another to political subdivisions, then, political subdivisions may not enter the field - and although the term "State" ordinarily includes political subdivisions, there are times when it does not.

One need look no further than the Eleventh and Fourteenth Amendments to the Constitution to find radically different usages of the term. As used in the Fourteenth Amendment, a "State" includes political subdivisions. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173 (1970). As used in the Eleventh Amendment, a "State" does not include political subdivisions. *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). In which sense was the term used in §§ 24 and 2(aa) of the Pesticide Control Act? I cannot say the issue is not "doubtful," even though the legislative history points to an answer that I would not have given had there been no such history. Although I consider this a close case, therefore, I agree that the district court reached the correct result.

No. 89-1905

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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WISCONSIN PUBLIC INTERVENOR AND TOWN OF CASEY,  
PETITIONERS

v.

RALPH MORTIER, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF WISCONSIN

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

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### QUESTION PRESENTED

The United States will address the following question:

Whether the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*) preempts the regulation of pesticide use by local units of government.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1905

WISCONSIN PUBLIC INTERVENOR AND TOWN OF CASEY,  
PETITIONERS

*v.*

RALPH MORTIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

1. In September 1985, the Town of Casey, in Washburn County, Wisconsin, adopted Town Ordinance 85-1, which regulates the use of pesticides. II Pet. App. C1-C17. The ordinance requires a permit prior to application of any pesticide to public lands or private lands subject to public use, and prior to any aerial application of pesticides to private lands. II Pet. App. C6. A permit applicant must submit information concerning the proposed pesticide appli-



cation to the Town Board, at least 60 days prior to the proposed use. *Id.* at C7-C11. The Town Board may grant the permit, deny it, or grant it with "reasonable conditions \* \* \* related to the protection of the health, safety, and welfare of the residents of the Town of Casey." *Id.* at C11-C12. The ordinance provides hearing rights for the permit applicant, or for any town resident. *Id.* at C12. If a permit is granted or granted with conditions, the permittee must post a placard giving notice of pesticide application and of any pertinent conditions. Violation of the ordinance carries a penalty of up to \$5000 for each violation. *Id.* at C15-C16.

2. a. Respondent Ralph Mortier applied for a permit to spray a portion of his land with a pesticide. The Town granted him a permit, but precluded aerial spraying and limited the land area that could be sprayed. I Pet. App. 5-6.

b. Respondents brought a declaratory judgment action in the Washburn County Circuit Court claiming that the Town of Casey's ordinance is preempted by state and federal law. The Washburn County Circuit Court ruled that both state and federal law preempt the regulation of pesticides by local governments, and that Ordinance 85-1 is therefore invalid. II Pet. App. B14-B15.

c. The Supreme Court of Wisconsin affirmed in a 4-3 decision. The majority concluded that the Town of Casey's ordinance is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*<sup>1</sup> Recognizing that FIFRA ex-

<sup>1</sup> First enacted in 1947, FIFRA was substantially revised in 1972. The 1972 amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute."

plicitly permits state regulation of pesticides (7 U.S.C. 136v), the majority concluded that the language of the statute and its legislative history reveal Congress's "clearly manifested intent \* \* \* to preempt any regulation of pesticides by local units of government." I Pet. App. 25.<sup>2</sup> The dissenting Justices concluded that the language of the statute and its legislative history were insufficient to express an intent to preempt local regulation. *Id.* at 9-25 (Abrahamson, J., dissenting); *id.* at 1-9 (Steinmetz, J., dissenting).<sup>3</sup>

### DISCUSSION

The question whether FIFRA preempts regulation by local governments of pesticide use warrants review by this Court. The issue has led to a split among the federal courts of appeals and state courts of last resort. The question is, in addition, one of recurring significance. On the merits, the issue is close, but we conclude that Congress has not expressed an intent to preempt local regulation with sufficient clarity to establish preemption. Permitting regulation

*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Among other things, FIFRA regulates the use, sale and production of pesticides, and provides for review, cancellation, and suspension of pesticide registrations. *Id.* at 992. Congress charged the Administrator of the Environmental Protection Agency (EPA) with administering the program. 7 U.S.C. 136w.

<sup>2</sup> The majority declined to "address the question of whether the enactments of the Wisconsin legislature also preempt the Town ordinance" (I Pet. App. 5 n.2), and decided only the question of federal preemption.

<sup>3</sup> The first volume of the Petition Appendix contains the majority opinion and the two dissenting opinions; the pagination of the opinions in the Appendix is not consecutive.

by local governments of pesticide use, moreover, is entirely consistent with the purpose and operation of FIFRA.

1. Review by this Court is appropriate to resolve a conflict among various federal and state courts regarding the preemptive effect of FIFRA. In addition to the Wisconsin Supreme Court in this case, two federal courts of appeals have held that FIFRA preempts regulation by local governments of pesticide use. See *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990), petition for cert. pending, No. 90-382; *Maryland Pest Control Ass'n v. Montgomery County*, 822 F.2d 55 (4th Cir. 1987) (Table), summarily aff'g 646 F. Supp. 109 (D. Md. 1986).<sup>4</sup> In conflict with these decisions, two state courts of last resort have held that FIFRA does not preempt local regulation of pesticide use. See *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990); *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150 (1984).<sup>5</sup> Indeed, several of these courts have

<sup>4</sup> See also *Maryland Pest Control Ass'n v. Montgomery County*, 884 F.2d 160, 161-162 (4th Cir. 1989) (noting that court had affirmed district court holding that local pesticide ordinances "were invalid under FIFRA" and that "FIFRA pre-empted local laws").

One lower state court has also concluded that local government regulation of pesticide use is preempted by FIFRA. *Long Island Pest Control Ass'n, Inc. v. Town of Huntington*, 72 Misc.2d 1031, 341 N.Y.S.2d 93 (1973), aff'd, 43 A.D.2d 1020, 351 N.Y.S.2d 945 (1974).

<sup>5</sup> One federal district court has also held that FIFRA does not preempt local regulation of pesticides. See *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), appeal pending, No. 89-1341 (10th Cir.) (oral argument set for January 15, 1991).

noted the conflicting holdings.<sup>6</sup> The issue raises important questions concerning the validity of local governmental actions in an area of public safety and health, and it arises frequently. The question is ripe for review by this Court.<sup>7</sup>

2. On the merits, we agree with petitioners that FIFRA does not preempt local government regulation of pesticide use.

a. The framework for analyzing preemption issues is well established. As this Court recently reiterated, the "question whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, No. 89-1298 (Dec. 3, 1990), slip op. 3 (internal quotation marks omitted). Preemption can occur through explicit statutory provisions; through implication if the federal role is pervasive and all-encompassing; or

<sup>6</sup> See, e.g., *Professional Lawn Care Ass'n*, 909 F.2d at 932-933 & n.2 (noting split and disagreeing with California Supreme Court's *Mendocino County* analysis); *Central Maine Power Co.*, 571 A.2d at 1193 (agreeing with *Mendocino County* and disagreeing with *Maryland Pest Control*).

<sup>7</sup> There is no reason to await the outcome of the appeal to the Tenth Circuit from the *COPARR* decision, note 5, *supra*. Regardless of the outcome of that decision, a conflict will be presented on this issue.

The Wisconsin Supreme Court's decision not to reach the possible state preemption ground (note 2, *supra*) also does not counsel against review. Because the court relied on federal grounds, this Court clearly has jurisdiction to review and decide the federal issue. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1040-1042 (1983); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-568 (1977). See also *California v. Ramos*, 463 U.S. 992, 997-998 n.7, 1014 (1983) (reversing with respect to the federal question and remanding the undetermined state law issue).



through a conflict between state law and federal law. *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). “[T]he historic police powers of the States [are] not to be superseded” by federal legislation “unless that [is] the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Moreover, the same principles govern with respect to challenges to local, as opposed to state, ordinances. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); see also *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Finally, reluctance to infer preemption is especially strong where, as here, the state or local regulation relates to health and safety issues which have been, “primarily and historically, a matter of local concern.” *Hillsborough*, 471 U.S. at 719.

b. The Wisconsin Supreme Court concluded that Congress’s “clearly manifested intent” was to preempt local regulation of pesticide use. I Pet. App. 25. It concluded that the statutory language, “coupled with the legislative peregrinations of the pesticide bill, unmistakably demonstrates the intent of [C]ongress to preempt local ordinances such as that adopted by the Town of Casey.” I Pet. App. 22. In our view, however, neither the statutory language nor the legislative history is sufficiently clear to establish preemption.<sup>8</sup>

<sup>8</sup> The dissenting Justices observed that “[t]he majority opinion does not fit into the traditional preemption analysis” of three categories (express, implied, and conflict), and that “[t]he majority opinion apparently attempts to find express preemptive intent not in the text of the statute but in legislative history.” I Pet. App. 9 n.3 (Abrahamson, J., dissenting). Cf. *Professional Lawn Care Ass’n*, 909 F.2d at 933 (noting that “FIFRA does not preempt the village ordinance by its

The statutory language itself plainly is inadequate to warrant a conclusion of preemption. Indeed, the state court both finds the statutory language “ambiguous” (I Pet. App. 15) and relies extensively on that language (*id.* at 22-25). The particular statutory provisions, however, fail to convey the meaning ascribed to them.

The state court places great weight on the specific authorization to States to regulate pesticide use. I Pet. App. 22-23. Section 24(a) of FIFRA specifically provides that a “State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.” 7 U.S.C. 136v(a). The state court concludes that, “[f]rom this alone, it is possible to infer that regulation by other governmental entities not protected from preemption \* \* \* is preempted.” I Pet. App. 23. This explicit authorization of state regulation, however, does not require the conclusion that local governments are preempted from regulating pesticide use. Indeed, as the California Supreme Court pointed out, it is entirely plausible to read the provision as leaving the allocation of regulatory authority to the discretion of each State, including the possible allocation of authority to local governments. See *Mendocino County*, 683 P.2d at 1159-1160.<sup>9</sup>

express terms” and that “[o]ur analysis of FIFRA and its legislative history leads us to conclude that when Congress rewrote the statute, it impliedly preempted the local regulation of pesticides.”).

<sup>9</sup> For the same reason, the fact that the definition of “State” in FIFRA (7 U.S.C. 136(aa)) does not specifically include local governments also does not establish a plain statement of preemptive intent. See *Mendocino County*, 683 P.2d at 1158.



Even if there is a distinction between the authority given to States by Section 24(a) and the authority of local governments, moreover, the state court's corollary—that local governments have *no* authority to regulate pesticide use—does not properly follow. For, even if Section 24(a) confers some regulatory authority on the States that might otherwise be considered preempted as inconsistent with, or repugnant to full effectuation of, the federal program, that does not mean that Congress otherwise sought to occupy the entire regulatory field. Thus, Congress's omission of local governments from the affirmative authorization of Section 24(a) would mean that local government ordinances are subject to the usual preemption analysis given to such local ordinances (see, e.g., *Hillsborough, supra*), rather than the terms of the special statutory authorization given to States under Section 24(a) (explicitly permitting state action that is not “prohibited by this subchapter”).

Nor, contrary to the state court's suggestion, does the express reference to political subdivisions and local agencies in other sections of FIFRA demonstrate that Congress intended to exclude local governments from regulating pesticide use, or even from the authorization conferred by Section 24(a). Indeed, the opposite conclusion may well be appropriate. Section 8(b) requires manufacturers to produce records for inspection “upon request of any officer or employee of the Environmental Protection Agency or of any State or political subdivision, duly designated by the Administrator.” 7 U.S.C. 136f(b). Section 23(a), in turn, authorizes the Administrator to enter into cooperative agreements with “States” to “delegate to any State \* \* \* the authority to cooperate in the enforcement of [the Act] through the use of its per-

sonnel.” 7 U.S.C. 136u(a) (emphasis added). It is apparent that “State” as used in Section 23(a) necessarily includes political subdivisions, since Section 8(b) makes clear that political subdivisions may be designated as inspectors. As pointed out by the concurrence in *Professional Lawn Care Ass'n*, if “State” includes political subdivisions in Section 23 of the Act, “it can hardly be a forgone conclusion” that “State” excludes political subdivisions where it appears in Section 24. 909 F.2d at 936-937.<sup>10</sup>

c. With respect to FIFRA's legislative history, indications of congressional intent on preemption present a close question. Although there are some strong and directly relevant committee statements favoring preemption of local regulation, the legislative history does not point entirely in one direction, and, in our view, does not demonstrate that Congress “unmistakably \* \* \* ordained” preemption of all local regulation. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

In this case, the Wisconsin Supreme Court focused principally on three aspects of the legislative history—the House Committee on Agriculture report, the Senate Committee on Agriculture and Forestry report, and a conflict between the Senate Committee on Agriculture and Forestry and the Senate Committee on Commerce. I Pet. App. 16-22. We shall discuss each in turn.

<sup>10</sup> Other sections of FIFRA also direct the Administrator to cooperate with local governments in carrying out various provisions of the statute. See 7 U.S.C. 136r(b) and (c), 136t(b). These provisions plausibly support the conclusion that Congress expected local governments to play a significant role in regulating pesticides; they certainly do not reveal a manifest intent to preempt local regulation of pesticide use.

The House Committee on Agriculture report states that "[t]he Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 states and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971). Although a decision not to authorize regulation is not necessarily coextensive with a decision to preempt (see also our discussion of the statutory text, page 8, *supra*), the House Committee report may be read to provide some evidence of congressional opposition to local regulation of pesticides.<sup>11</sup>

The Senate Committee on Agriculture and Forestry contains a more emphatic statement. Its report declares that the Committee "considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives." S. Rep. No. 838, 92d Cong., 2d Sess. 16 (1972).<sup>12</sup>

<sup>11</sup> It is also possible that, as the California Supreme Court concluded, the House report should be given a more limited reading. See *Mendocino County*, 683 P.2d at 1160 ("The report of the House Committee on Agriculture did not state that political subdivisions should be prohibited from regulating but only that they should not be authorized to regulate. This is consistent with the ordinary view that states are free to distribute regulatory power between themselves and their political subdivisions.").

<sup>12</sup> The Senate Committee report further states:

Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert

Thus, if the Senate and House Agriculture Committee reports on the bill were the only evidence of congressional intent, the issue would be whether these statements should be given effect even though the statutory language did not itself clearly express a congressional intent to preempt local regulation.

The Senate Commerce Committee also had jurisdiction over the bill, however, and its role suggests that Congress contained conflicting views on local regulation of pesticide use. The Commerce Committee noted that, "[w]hile the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner." S. Rep. No. 970, 92d Cong., 2d Sess. 27 (1972) (emphasis added). The Commerce Committee was particularly concerned because "[m]any local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators." *Ibid.* The Commerce Committee therefore proposed an amendment explicitly authorizing local regulation of pesticides; after intense negotiations with the Senate Agriculture Committee about numerous amendments, the amendment was not

regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.

S. Rep. No. 838, *supra*, at 16-17.



adopted. The Commerce Committee, however, never disavowed its view that the bill itself did not preempt local regulation.

As a result of these competing strains in the legislative history, Justice Abrahamson's conclusion in her dissenting opinion below—that the “members of both Senate committees agreed to disagree on the issue of preemption of local regulation” (I Pet. App. 20 (dissenting opinion))—is an entirely plausible reading of the legislative record.<sup>13</sup> Contrary to the majority's suggestion (I Pet. App. 21), moreover, the fact that an Agriculture Subcommittee chairman reiterated the Senate Agriculture Committee's view to the limited extent of merely inserting it into the Congressional Record does not establish that this view was shared by the Commerce Committee, which also had jurisdiction over the bill, or by the Senate as a whole.<sup>14</sup>

Thus, although the legislative history contains strong evidence of a desire by at least some Members of Congress to preempt all local government regulation, that view clearly was not uniform. This

<sup>13</sup> See also *Mendocino County*, 683 P.2d at 1161 (“The history of the Senate proceedings establishes only that there was a compromise and that under that compromise the Committee on Commerce's intention to authorize local government regulation was rejected. The act provides a ‘state’ may regulate, which would ordinarily be interpreted as permitting the states to delegate their power, and nothing in the compromise explanation precludes such delegation.”); *Central Maine Power Co.*, 571 A.2d at 1193 (agreeing with *Mendocino County* reading of legislative history).

<sup>14</sup> The state supreme court incorrectly suggests that “the full Senate \* \* \* rejected the amendment proposed by the Senate Commerce Committee.” I Pet. App. 20. See *id.* at 22 (Abrahamson, J., dissenting).

disagreement—coupled with the lack of a clear statement of preemption in the statutory text and the powerful presumption against inferring preemption of local government authority in matters of public safety and health—persuades us that insufficient evidence exists of a “clear and manifest purpose” (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230) to deprive local governments of the ability to regulate the use of pesticides.

3. The purpose and operation of FIFRA, moreover, do not require federal preemption of local regulation of pesticide use. Properly viewed, FIFRA establishes a regulatory partnership between federal, state and local governments. Section 22(b) expressly recognizes this multi-level approach by directing the Administrator to “cooperate with \* \* \* any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this Act, and in securing uniformity of regulations.” 7 U.S.C. 136t(b). As this provision recognizes, not all environmental problems are best addressed by exclusively federal solutions, or even by statewide programs. Some may more appropriately be addressed by a regulatory system characterized by a set of basic federal standards that States may supplement, either by their own regulations or by local regulations adopted within the framework of appropriate state delegation.<sup>15</sup>

<sup>15</sup> The state supreme court also cited, as support for its conclusion, an EPA statement issued in 1975. I Pet. App. 25-26. This reliance is misplaced. The quoted language is from the preamble to EPA's final rule regarding approval of state plans for certification of pesticide applicators. 40 Fed. Reg. 11,700 (1975). This rule pertains to a different section of FIFRA, 7 U.S.C. 136i(a)(2), in which Congress authorized States to develop applicator certification plans—



To be sure, an exclusively federal approach is necessary in certain areas of pesticide regulation. One such area is labeling. Due to the burden on commerce that would be imposed by different labeling requirements in States and localities across the country, Congress clearly preempted all but federal regulation. See 7 U.S.C. 136v(b). With respect to the use of pesticides, however, the ability of local governments to exercise discretion in enacting specific controls is an essential part of the overall federal/state regulatory framework. As petitioners correctly note (at 39-40), this framework is an integral part of the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642. Those Amendments require States to develop programs to protect wellhead areas from contaminants (which include pesticides, 42 U.S.C. 300f(6)), and to "specify the duties of State agencies, local governmental entities, and public water supply systems with respect to the development and implementation of [the] programs." See 42 U.S.C. 300h-7(a)(1). Under the ruling below, local governments could be substantially hampered in playing their intended role in protecting groundwater recharge areas from pollution by pesticides. Cf. EPA Office of Ground-Water Protection, *Protecting Ground-Water: Pesticides and Agricultural Practices* 3 (1988) (recognizing importance of

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not to state regulation of "the use" of pesticides authorized by Section 24. The purpose, scope, and specific provisions of the applicator certification plan procedure are entirely different from the general issue concerning local regulation of pesticide use presented by this case. To the extent that the EPA statement in the preamble is subject to a broader reading, the language could have been more precise; EPA's position, in any event, is that local governments are not preempted from regulating pesticide use.

local governments in addressing problem of pesticide contamination of groundwater).

4. In sum, the FIFRA preemption question presented in this case warrants review because it is an important and recurring issue on which federal and state courts are in conflict. Although the preemption issue is not without difficulty, it is our view that Congress has not established with requisite clarity an intent to preempt all local government regulation, particularly in a field involving safety and health and a context in which a local governmental role furthers the overall structure and purpose of the federal statutory program.<sup>16</sup>

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<sup>16</sup> We do not suggest granting certiorari on the second question presented by petitioners, involving a Tenth Amendment issue. Unlike the FIFRA preemption issue, the Tenth Amendment issue has not been well developed, either in this case or in other cases concerning local regulation of pesticide use. Unlike the FIFRA preemption issue, moreover, there is no split of appellate authority concerning the Tenth Amendment question. See generally *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

We also see no need to grant the later-filed petition in *Village of Milford v. Professional Lawn Care Ass'n*, No. 90-382. Petitioner in that case urges the Court to grant in both cases on the ground that *Professional Lawn Care Ass'n* presents an issue of a regulation concerning notice, rather than use. Pet. 18. The court of appeals rested its holding in that case on the ground that the regulation concerned use, and thus the issue presented by the court of appeals' holding is basically the same as the issue presented by this case. 909 F.2d at 932. If the petition in this case is granted, it would be appropriate to hold the petition in *Professional Lawn Care Ass'n* and dispose of it in light of the decision here.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to the first question presented in the petition.

Respectfully submitted.

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WISCONSIN PUBLIC INTERVENOR, and TOWN OF  
CASEY,

Petitioners,

v.

RALPH MORTIER and  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION,

Respondents.

ON WRIT OF CERTIORARI TO THE  
WISCONSIN SUPREME COURT

BRIEF OF PETITIONERS

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## QUESTIONS PRESENTED FOR REVIEW

1. Under the Supremacy Clause of the United States Constitution, is the authority of local units of government to enact ordinances in the exercise of their police powers to protect their citizens and environments from hazards of chemical pesticides preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§136-136y (1988)?

2. Where the Congress in FIFRA expressly allows states to regulate pesticides, may FIFRA, consistent with fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution, be interpreted to deprive states of their authority to delegate to local governments the task of regulating pesticides for protecting the health, safety, and welfare of their citizens?

## LIST OF PARTIES

The parties to these proceedings are the same as those to the proceedings below, and are all stated in the caption of this case. The petitioners (original defendants) are the State of Wisconsin Public Intervenor and Town of Casey, Wisconsin, Imbert M. Eslinger, Louis N. Place, Roland K. Colby. The respondents (original plaintiffs) are Ralph Mortier and Wisconsin Forestry/Rights-of-Way/Turf Coalition.

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OPINIONS BELOW

The decision of the Wisconsin Supreme Court in this case is reported as Mortier v. Town of Casey, 154 Wis. 2d 18, 452 N.W.2d 555 (1990) (I App. A to Cert. Petn. at 1).<sup>1</sup>

The decision of the Washburn County, Wisconsin Circuit Court in Ralph Mortier, et al. v. Town of Casey, et al., is in 1) the PARTIAL TRANSCRIPT -- FINDINGS BY THE COURT MOTION HEARING (R. 33:1-7) and 2) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, Case No. 86-CV-134 (Filed June 16, 1988) (R. 28:1-4) (II App. B to Cert. Petn.).

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<sup>1</sup>Citations to "App. to Cert. Petn." are to the Appendix to the Petition for Writ of Certiorari. By motion dated January 25, 1991, petitioner requested the Court to dispense with the requirement for a Joint Appendix on the grounds that it would be completely redundant with the Appendix to the Petition for Writ of Certiorari.

## JURISDICTION

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257(a) (1988).

Here a final judgment was entered by the Wisconsin Supreme Court, the highest court in the State of Wisconsin, by opinion filed March 12, 1990, on the above-captioned matter. That judgment voided a local ordinance on the ground that that ordinance was preempted by federal law (FIFRA), and therefore was repugnant to the Supremacy Clause of the United States Constitution.

The controlling question arises under art. VI, clause 2, of the United States Constitution, the supremacy clause, which provides that all laws of the United States made pursuant to the Constitution are "the supreme law of the land . . . any thing in the constitution or laws of any state to the contrary notwithstanding."

Mortier v. Town of Casey, 154 Wis. 2d at 21, 452 N.W.2d at 556. Within 90 days of the Wisconsin Supreme Court decision, on June 5,

1990, petitioner filed in this Court and served on the parties under Supreme Court Rule 13, a petition for writ of certiorari to review the Wisconsin Supreme Court decision. The United States Supreme Court may grant a petition for writ of certiorari under 28 U.S.C. §1257(a):

Final judgments or decrees rendered by the highest court of a state . . . may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn into question on the ground that it is repugnant to the Constitution, . . . or laws of the United States . . . .

A local ordinance is deemed a state statute for purposes of invoking the jurisdiction of the United States Supreme Court. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, on remand, Immuno Intern, A.G. v. Hillsborough County, Fla., 775 F.2d 1430 (11th Cir. 1985). The Court may review the validity of a local ordinance which was

assailed as unconstitutional by final judgment or decree of the highest state court in which a decision could be had. Id.

CONSTITUTIONAL PROVISIONS, STATUTES AND  
ORDINANCES INVOLVED

Constitutional Provisions

Article VI, Clause 2 Supremacy Clause

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutory Provisions

Federal Insecticide, Fungicide and  
Rodenticide Act (FIFRA),  
7 U.S.C. §§ 136(aa), 136v(a) and (b),  
136t(b) (1988).

7 U.S.C. §136(aa):

**State.**--The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

7 U.S.C. §136v(a) and (b):

**Authority of States**

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. §136t(b):

(b) **Cooperation.**--The Administrator shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this subchapter, and in securing uniformity of regulations.



Ordinances

Town of Casey, Washburn County, Wisconsin Ordinance No. 85-1 (1985) (R. 28:1-4, 33:1-7; II App. C to Cert. Petn.).

STATEMENT OF THE CASE

Proceedings Below

This case is before the Court on order granting a petition for writ of certiorari to review the Wisconsin Supreme Court decision that affirmed a Washburn County, Wisconsin, Circuit (trial) Court decision and order (R. 28:1-4, 33:1-7; II App. B to Cert. Petn.) declaring Town of Casey, Washburn County, Wisconsin, Ordinance 85-1 (II App. C to Cert. Petn.), "void, invalid and of no effect."

The ordinance requires a permit from the town prior to application of pesticides to public lands, private lands subject to public use, and to aerial application of pesticides in the town. Ord. §1.2. Under the ordinance, permit decisions are to be

made after applicants submit adequate information upon which intelligent decisions can be made. Ord. §1.3. Hearing rights are provided. Ord. §1.3(4) and (5). A nominal application fee is required. Ord. §1.3(6). And public notice of pesticide applications through placarding is required. Ord. §1.3(7). Each violation of the ordinance carries "a forfeiture of up to \$5,000.00." Ord. §2.

Respondents challenged the validity of the ordinance in the Washburn County Circuit Court, Case No. 86-CV-134, naming the Town of Casey and named town board members as defendants. Amended Complaint, R. 18:1-30. The Wisconsin Public Intervenor, acting pursuant to Wis. Stat. §§165.07 and 165.075,<sup>2</sup> was admitted by the court on

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<sup>2</sup>The Wisconsin Public Intervenor is an assistant attorney general charged under Wis. Stat. §§165.07 and 165.075 with the specific duty of intervening and initiating actions in any court or agency for "the protection of 'public rights' in the water (continued...)"

motion (R. 6:1-13) and without objection as a party defendant. R. 11.

By amended motion dated December 1, 1986, R. 21:1-2, respondents moved for summary judgment alleging the town's ordinance was invalid on the grounds it was preempted by federal and state law, and interfered with the federal regulatory scheme. No other grounds were alleged or briefed. The reasonableness of the

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<sup>2</sup>(...continued)

and other natural resources" of the state. The intervenors do not represent all rights and interests within the scope of those authorized to be represented by the Wisconsin Attorney General, and because the intervenors' advocacy on behalf of environmental "public rights" sometimes requires the bringing of actions against Wisconsin state agencies often represented by the Attorney General, the Public Intervenor does not appear here on behalf of the State of Wisconsin, the Wisconsin Attorney General, the Governor, or any state agency other than the Office of Wisconsin Public Intervenor. For a discussion of the Wisconsin Public Intervenor, see Dubois, P., Christenson, A., "Public Advocacy and Environmental Decisionmaking," Environmental Quality Series, Monograph No. 26, University of California-Davis (1976), copies of which will be gladly provided to the Court and the parties on request.

ordinance, or any of its parts, were not contested in the motion.<sup>3</sup>

The Washburn Circuit Court granted respondents' motion and declared void the town's ordinance, and impliedly all others like it, as preempted by both state and federal laws (R. 28:1-4, 33:1-7; II App. B to Cert. Petn.).

The order, supported by findings of fact and conclusions of law by the Washburn County Circuit Court, enjoined the Town of Casey and town officials from enforcing Ordinance 85-1. The grounds in support of the order were that: the ordinance was

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<sup>3</sup>The motion (R. 21:1-2) did not address the Commerce Clause Claim in the Amended Complaint (R. 18:14). But, where it is found Congress does not preempt or preserves state and local regulation in the field, the "exercise of that power does not represent an 'unreasonable' and therefore impermissible burden on interstate commerce." National Agr. Chemicals Ass'n v. Rominger, 500 F. Supp. 465, 471 (E.D. Cal. 1980), citing Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). See also Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541 (D.C. Cir.), cert. den., 469 U.S. 1062 (1984).

preempted by federal law through FIFRA, 7 U.S.C. § 136-136y (1988); Congress intended to preempt the regulation of pesticides by local governments; local pesticide regulation is preempted by state law; and the ordinance conflicts with federal and state laws and regulations.

Appeal was made to the Wisconsin Court of Appeals. The Wisconsin Supreme Court accepted the case on bypass of the court of appeals pursuant to the joint petition of all parties. Mortier, 154 Wis. 2d at 20 n.2, 452 N.W.2d at 555 n.2. A divided Wisconsin Supreme Court affirmed the order of the Washburn County Circuit Court exclusively on the federal pre-emption question. Id.

On June 5, 1990, the Wisconsin Public Intervenor filed in this Court and served on the parties a petition for a writ of certiorari to the Wisconsin Supreme Court for review of that court's decision. On or

about July 3, 1990, and August 13, 1990, respondents filed and served a brief and supplementary brief in opposition to the petition for certiorari. By order of October 1, 1990, the Court invited the United States Solicitor General to file a brief stating the views of the United States on the petition.

On December 21, 1990, the Solicitor General filed his brief, stating his position that it would be appropriate for the Court to grant the petition and to reverse the Wisconsin Supreme Court's holding that FIFRA preempts local regulation of pesticides. The Solicitor General recommended the Court grant the petition with respect to the first question raised in the petition. "The question whether FIFRA preempts regulation by local governments of pesticide use warrants review by this Court." Brief for the United States at 3. The Solicitor General suggested the Court



not grant certiorari on the second question raised, that being,

Where the Congress in FIFRA expressly allows states to regulate pesticides, may FIFRA, consistent with fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution, be interpreted to deprive states of their authority to delegate to local governments the task of regulating pesticides for protecting the health, safety, and welfare of their citizens.

Brief for the United States at 15 n.16.

On January 14, 1991, the Court granted the writ of certiorari without qualification.

#### Other Cases In Conflict On The Issue

The Wisconsin Supreme Court decision on the federal preemption question presented here conflicts with the state court of last resort decisions in People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984), and Central Maine Power Company v. Town of Lebanon, 571 A.2d 1189 (Me.

1990). The Maine and California decisions are in conflict with the Wisconsin Supreme Court decision, the sixth circuit court decision in Professional Lawn Care Ass'n v. Village of Milford, 909 F.2d 929 (6th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3180 (Aug. 31, 1990) (No. 90-382), and the federal district court decision in Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109 (U.S.D.C. Md. 1986), aff'd without opinion, 822 F.2d 55 (4th Cir. 1987). One other federal district court decision on the same federal issue is consistent with the California and Maine decisions, and is on appeal in the tenth federal circuit court: COPARR Ltd., et al. v. City of Boulder, 735 F. Supp. 363 (D. Colo. 1989) (II App. D to Cert. Petn.), appeal docketed No. 89-1341 (10th Cir., Nov. 1, 1989), appeal stayed Jan. 15, 1991, pending outcome of Mortier.

## SUMMARY OF ARGUMENT

Deference to "the historic police powers of the states" and their role in the federal system requires that preemption of state authority under the Supremacy Clause be "the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Preemption of local ordinances is analyzed in the same way as preemption of state laws. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. at 713-14. States, of course, commonly exercise their police powers by delegating regulatory authority to local and municipal governments. See Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) [7 U.S.C. §136v] does not evince a clear and manifest purpose of Congress to preempt local governments from enacting pesticide use regulations.

First, Congress expressly preserved the authority of the states to exercise their historic police powers to regulate "the sale or use of any federally registered pesticide . . . to the extent the regulation does not permit any sale or use prohibited by [FIFRA]." FIFRA §24(a) [7 U.S.C. §136v(a)]. The act clearly contemplates concurrent regulation by state and federal authorities of the sale and use of pesticides.

Second, although Congress expressly dealt with preemption in the law [FIFRA §24; 7 U.S.C. §136v], there is no provision in FIFRA expressly prohibiting local governmental agencies from regulating the use of pesticides, expressly providing the term "State" excludes such agencies, or providing that states may not act through their local agencies.

Third, under FIFRA §24(b) [7 U.S.C. §136v(b)] Congress expressly preempts states only in the narrow field of pesticide

labelling and packaging, and under §24(a) where state regulation would "permit any sale or use prohibited by this Act." These provisions necessarily imply Congress intended to preempt states and their local governments only in the narrow areas specified. It would be absurd to interpret these provisions preempting states as excluding municipalities, so as to allow local governments to regulate in areas Congress exclusively reserved to the federal government.

Fourth, the instruction in FIFRA §22(b) [7 U.S.C. §136t(b)] to the federal Environmental Protection Agency Administrator to cooperate with "any State or any political subdivision thereof . . . in securing uniformity of regulations," would be meaningless unless Congress intended there would be authority in local governments to adopt pesticide use regulations.

Fifth, courts finding that FIFRA preempts local regulation have made the fundamental mistake of applying the "express mention-implied exclusion" rule to the FIFRA §2(aa) [7 U.S.C. §136(aa)] definition of "State," then inserting the resulting definition into the "anti-preemption" provision of FIFRA §24(a), so as to exclude municipalities from their condition of "anti-preemption." See California Federal Savings & Loan Association v. Guerra, 479 U.S. 272, 295-96 (1987) (Scalia, J., concurring). Application of the maxim's definition of "State" to the FIFRA's preemption provision defeats Congress' intent to preempt state and local governments from regulating pesticide labelling and packaging. More importantly, the maxim's use necessarily assumes erroneously the issue in the preemption analysis is whether Congress in the anti-preemption provision clearly allowed state



governments to delegate pesticide regulatory responsibilities to their local governments.

Sixth, the legislative history of FIFRA (set forth in Deukmejian, 683 P.2d 1158-59) shows the Congress agreed to disagree on the issue of local preemption. Despite addressing the issue of local preemption head-on, congressional committees and individual legislators failed to get language preempting local governments into the express preemption section of the law. That others failed to get "anti-preemption" language into the law for local governments does not evince an affirmative "clear and manifest purpose of Congress" to preempt. The House of Representatives did not address preemption of local governments from regulating pesticide use at all, and the full Congress acting on the compromise conference bill did not vote on the issue. Deukmejian, 683 P.2d at 1160-61.

Seventh, the regulation of pesticides by federal and state governments is not adequate or so comprehensive as to give rise to an inference that Congress intended to displace local government regulation. Because of inadequacies in the federal regulatory program, the environment and "the public's health may be at risk from exposure to these pesticides." General Accounting Office, LAWN CARE PESTICIDES--Risks Remain Uncertain While Prohibited Safety Claims Continue (March 1990) at 5. The federal law is not comprehensive. It does not cover many crucial areas left in the pesticide regulatory arena that local ordinances do, such as timing pesticide applications to reduce public exposure, protecting vulnerable local ground and surface public water supplies, or tailoring pest management alternatives and conditions to be responsive to local needs. Even comprehensive federal regulation would not show Congress clearly

intended to preempt the field. Hillsborough, 471 U.S. at 717-19.

Eighth, interpreting FIFRA as preempting local government regulation of pesticides would be inconsistent with the deference required under the Supremacy Clause to states which normally may distribute power to their political subdivisions, and is in conflict with the federal Safe Drinking Water Amendments of 1986 and the EPA's Ground-Water Protection Strategy which specifically encourage local regulation of pesticide use to protect local groundwater supplies.

Lastly, if FIFRA were interpreted to preempt local governments from regulating pesticide use, the issue would arise whether Congress may, consistent with fundamental rules of federalism embodied in the Tenth Amendment, interfere with the states' power to distribute internally their traditional powers of regulation. Deukmejian, 683 P.2d

at 1161 n.11. Because FIFRA can be interpreted as not preempting states from delegating power to local governments, the constitutional issue can and should be avoided. U.S. v. Security Indus. Bank, 459 U.S. 70, 78 (1982).

#### ARGUMENT

THE STATE AUTHORITY TO DELEGATE, AND THE LOCAL GOVERNMENT AUTHORITY TO EXERCISE, THE POLICE POWER TO PROTECT CITIZENS AND THE ENVIRONMENT FROM PESTICIDES HAS NOT BEEN PREEMPTED BY FEDERAL LAW.

##### A. The Federal Preemption Test.

Neither the state trial court nor the Wisconsin Supreme Court made a finding, nor could they, that federal law expressly preempts local pesticide ordinances. The courts found only implied preemption. In so doing, the court did not follow the governing rules on the issue.

Congress can preempt regulation of an area in a variety of ways.

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law . . . , when there

is outright or actual conflict between federal and state law . . . , where compliance with both federal and state law is in effect physically impossible . . . , where there is implicit in federal law a barrier to state regulation . . . , where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law . . . , or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 368-69 (1986) (citations omitted).

It is well established that congressional intent to preempt must be unmistakably clear. For purposes of the Supremacy Clause, the preemption of local ordinances is analyzed in the same way as preemption of state laws. Hillsborough, 471 U.S. at 713-14. A court must be firmly convinced that Congress has clearly manifested its intent to preempt local regulation before striking down local health

and safety regulations. Southern Pacific Co. v. Arizona, 325 U.S. 761, 766 (1945).

Implied preemption is not favored. As stated in Rice, 331 U.S. at 230, "we start with the assumption that the historic police powers of the states were not superseded by the federal act unless that was the clear and manifest purpose of Congress." See also, e.g., Huron Portland Cement Co. v. Detroit, 362 U.S. at 440, and City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984), cert. den., 471 U.S. 1140 (1985), quoting Rice v. Santa Fe Elevator Corp.. See also State ex rel. Cornellier v. Black, 144 Wis. 2d 745, 425 N.W.2d 21 (Ct. App. 1988).

In Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 147 (1963), the Court described the required showing as being a demonstration of "an unambiguous congressional mandate" to affirmatively pre-



empt state regulation. The rationale for this rule was explained by the Court, 373 U.S. at 146:

The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the "historic police powers of the States," is not to decree such a federal displacement "unless that was the clear and manifest purpose of Congress."

See also Rice v. Santa Fe Elevator Corp., and Jones v. Rath Packing Co., 430 U.S. 519 (1977).

The court in Chevron v. Hammond, states that the "'exercise of federal supremacy is not lightly to be presumed' [citation omitted]. The justification for such caution is that Congress certainly has the power to 'act so unequivocally as to make it clear that it intends no regulation but its own' [citation omitted]." Id., 726 F.2d at 488.

An even stronger presumption applies when the claim is that Congress impliedly

preempted the power of the states to allocate governmental powers as they choose, such as to local governments that regulate activities touching interests deeply rooted in local feeling and responsibility.

But even when Congress may be said to have manifested an intent to preempt state regulation in a particular field, a state is not automatically stripped of all authority to act in that area. When the regulated activity touches interests which are especially "deeply rooted in local feeling and responsibility," there is no preemption. Brown v. Hotel Employees, 468 U.S. 491, 502 (1984) (citations omitted); . . . . A state will not be deprived of jurisdiction over matters of exceptional local interest unless there is a "compelling congressional direction" to desist from enforcing local law. Farmer v. Carpenters, 430 U.S. 290, 296-97 (1977).

State ex rel. Cornellier v. Black, 114 Wis. 2d at 753, 425 N.W.2d at 24 (citations omitted); Mortier, 154 Wis. 2d at 46, 452 N.W.2d at 567 (Steinmetz, J., dissenting). Thus the presumption against preemption is

particularly strong when the challenged regulation concerns an area that is traditionally subject to local control. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 740 (1985); Hillsborough, 471 U.S. at 715; Jones v. Rath Packing Co., 430 U.S. at 525. States and political subdivisions of states have traditionally regulated issues affecting the health and safety of their citizens and have enjoyed great latitude under their police power to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons." Slaughter-House Cases, 16 Wall. 36, 62, 21 L.Ed. 394, 404 (1873), quoting Thorpe v. Rutland and Burlington R.R. Co., 27 Vt. 140, 149 (1855).

The Court's reluctance to infer preemption is grounded in its deference to the role of states in our federal system. If congressional intent to purpose is ambiguous, courts should be slow to find preemption, "[f]or the state is powerless to remove the ill effects of our decision, while the national government,

which has the power, remains free to remove the burden." Penn Dairies v. Milk Control Comm'n, 381 U.S. 261, 275 (1943).

Mortier, 154 Wis. 2d at 34, 452 N.W.2d at 561-62 (Abrahamson, J., dissenting).

It is not enough for preemption proponents to present mere indicia supporting an arguable inference of intent to preempt. In the face of the heavy presumption against preemption, indicia in the law of the intent not to preempt, ambivalence in legislative intent to preempt, and the deference that is owed to the states to distribute regulatory authority to their local governments, preemption challenges such as this one must fail.

B. Congress Expressly Preserved The Right Of States To Regulate Pesticides Under Their Historic Police Powers.

Although no "anti-preemption" provisions are generally necessary in federal laws to preserve the states'

traditional exercise of police powers, FIFRA §24(a) [7 U.S.C. §136v] expressly preserves the historic police powers of the states to regulate "the sale or use of any federally registered pesticide . . . but only if and to the extent the regulation does not permit any sale or use prohibited by this Act." The act clearly contemplates concurrent regulation by state and federal authorities in the sale and use of pesticides, with state regulation being as strict or stricter than federal regulation. "To put it bluntly, except as to labeling and packaging, a congressional intent to prohibit any registration which differs from the federal requirements is simply not to be found on the face of the statute." Rominger, 500 F. Supp. 465, 469 (E.D. Cal. 1980). The same can be fairly id for the regulation of pesticide use.

C. Congress Has Not Expressly Preempted State Or Local Units Of Government From Regulating Pesticide Use.

There is no provision in FIFRA expressly prohibiting local governmental agencies from regulating the use of pesticides, expressly providing that the term "State" excludes such agencies, or providing that the state may not act through its local agencies.

Deukmejian, 683 P.2d at 1158.<sup>4</sup>

<sup>4</sup>In the Wisconsin Supreme Court respondents' cited Chemical Specialties Manufacturers Association v. Clark, 482 F.2d 325 (5th Cir. 1973), in support of their implied preemption argument. We welcome it. There, the court found the express preemption clause that is necessary to preclude local regulation of detergent labelling. More notably, review of FIFRA §24(b) [7 U.S.C. §136v(b)] reveals that Dade County's concession of FIFRA preemption of local detergent pesticide labelling (id. at 327 n.4) is based on the express language in FIFRA specifically prohibiting states (and local governments) from imposing additional requirements on pesticide labels. It is precisely this level of clear intent to preempt that is lacking with respect to local regulation of pesticide use.

See also New York State Pesticide Coalition, Inc., et al. v. Jorling, 874 F.2d 115 (2nd Cir. 1989), in which the Second Circuit Court of Appeals recently held that state posting and notice requirements for  
(continued...)



Where implied preemption has been found, it has been based on inferences raised from FIFRA and legislative history.

D. FIFRA Evinces A Congressional Intent Not To Preempt Local Governments From Regulating Pesticide Use.

Express language in FIFRA strongly implies Congress contemplated local regulation in the field.

First, the chief express preemption provision in FIFRA, §24(b) [7 U.S.C. §136v(b)] necessarily implies that local units of government are contemplated within the coverage of the term "States," which are preempted from regulating pesticide labelling or packaging. Chemical Specialties Manufacturers Association v. Clark, 482 F.2d 325, 327 n.4 (5th Cir. 1973). It is clear Congress wanted the U.S. Environmental Protection Agency (EPA) to have exclusive

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<sup>4</sup>(...continued)  
lawn care applicators were not preempted by FIFRA's express preemption of state labelling laws.

authority over this area of pesticide regulation. It only follows then under FIFRA §24(a) [7 U.S.C. §136v(a)], that with the "States" that are left free to "regulate the sale or use of any federally registered pesticide or device in the State," local governments also are necessarily implied to retain their delegated state authority to so regulate.<sup>5</sup>

Second, FIFRA §22(b) [7 U.S.C. §136t(b)], states:

(b) Cooperation. -- The Administrator shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of

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<sup>5</sup>None of the courts holding in favor of local preemption have discussed, or appear to have even considered, a plain reading of FIFRA §24(b) as necessarily including municipalities within the term "State." Yet, this is the only reading that is compatible with the meanings of §§2, 24(a) and 24(b), while excluding municipalities from "States" in §24(b) yields the absurd result of authorizing local governments to regulate pesticide labelling and packaging.

this act, and in securing uniformity of regulations.

The instruction in this section to the EPA administrator to cooperate with any political subdivision (municipality) of a state to secure uniformity of regulations would be meaningless if local subdivisions were not viewed as retaining their authority to adopt regulations in the first place. By adopting this provision, Congress contemplated there would be the authority in municipalities to adopt pesticide regulations for which the goal of uniformity would be sought through cooperation with the administrator.

E. FIFRA §§2 And 24 Do Not Demonstrate Express Or Implied Intent To Preempt Local Regulation Of Pesticide Use.

The Wisconsin Supreme Court rejected respondents' argument that Congress' use of the term "State" in FIFRA §24 [7 U.S.C. §136v], allowing states to retain their authority to regulate sale or use of

pesticides, is an express or clear intent to exclude their political subdivisions from regulating. "Because it is not clear that the statutory language alone evinces congress' manifest intent to deprive political subdivisions of authority to regulate pesticides, it is ambiguous." Mortier, 154 Wis. 2d at 25, 452 N.W.2d at 557-58.

Only after reviewing FIFRA's legislative history, and applying the "express mention, implied exclusion" rule, did the court conclude that Congress must have meant the term "State" in FIFRA §§2(aa) [7 U.S.C. §136(aa)] and 24(a) to exclude local governments from the "anti-preemption" provision of §24(a). Mortier, 154 Wis. 2d at 28-29, 452 N.W.2d at 558-59. Referring to FIFRA §2(aa) defining "State," without even considering this definition's application to the preemption provision itself [§24(b)], the court concluded, "This

provision in itself is persuasive under the exclusion rule<sup>6</sup> that omitted governmental entities such as the Town of Casey are excluded or deprived of the right to regulate the use of pesticides." Mortier, 154 Wis. 2d at 29, 452 N.W.2d at 560. This line of reasoning is inherently flawed.

First, FIFRA §2(aa) does not expressly exclude local governments from the definition of "States." Deukmejian, 683 P.2d at 1158. Congress could have expressly excluded local governments from the definition simply by stating the term "does

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<sup>6</sup>The term "exclusion rule" is used in the official reporter, while the term "exclusio rule" is used in the Northwest 2d reporter.

The "exclusion rule" to which the court refers appears to be the maxim expressio unius est exclusio alterius, "the expression of one thing excludes others not expressed." Bailey v. Federal Intermediate Credit Bank of St. Louis, 788 F.2d 498, 500 (8th Cir.), reh. and reh. en banc den., cert. den., 479 U.S. 915 (1986). The maxim is used here to support the claim "that the reference to 'State' should be read as excluding local governmental regulation." Deukmejian, 683 P.2d at 1160.

not include their political subdivisions." Congress did not.

Second, application of the court's definition of "States" under FIFRA §2(aa), so as to exclude their political subdivisions from FIFRA §24(a)'s broad allowance of state regulation in the field, yields an absurd result when the definition is applied to the actual express preemption provision in FIFRA §24(b). While the court's definition of state (excluding local governments) would deprive local governments of the power to regulate pesticide use under §24(a), it would at the same time under §24(b) authorize local governments to regulate pesticide labelling and packaging, an area where their own states, by express preemption, may not. "Although sub. (b) only expressly prohibits states from dealing with labeling, it impliedly includes preemption of local governmental units in this area also. Any other interpretation



would create an absurd result." Mortier, 154 Wis. 2d at 48, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

Third, there is nothing in the FIFRA definition of the term "States" that remotely suggests local governments are not already to be considered creatures and arms of the states, as in fact they are. Deukmejian, 683 P.2d at 1160. This is the necessary intent in the very section of the act that does preempt state regulation in the field, FIFRA §24(b) [7 U.S.C. §136v(b)]. To assume that normally the term "States" in federal statutes that expressly preempt state authority does not include their local governments is to ignore the obvious and, as in this case, to inordinately deprive states of fundamental powers. Deukmejian, 683 P.2d at 1158, 1160-61.<sup>7</sup>

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<sup>7</sup>This is one reason why it is a fundamental mistake to point to the lack of "anti-preemption" language as evidence that a sub-federal governmental unit is preempted (continued...)

Fourth, the "exclusion rule" was improvidently applied by the Wisconsin court to dictate the intent of FIFRA.

Because local governmental agencies are political subdivisions of the state, the maxim may not be applied. The maxim may be applied to comparable or perhaps similar nouns, but there is no reason to apply it to exclude agents of the enumerated party. Moreover, even if the maxim were applicable, it would only warrant the conclusion that the statute did not authorize regulation; it would not establish that local regulation was prohibited.

Deukmejian, 683 P.2d at 1160 (emphasis added). "This rule of exclusion . . . , is only an aid to statutory construction, not a rule of law." Campbell v. Wells Fargo

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<sup>7</sup>(...continued)  
from exercising its traditional police powers. Cf. California Federal Savings and Loan Association v. Guerra, 479 U.S. at 295-96 (Scalia, J., concurring) (federal preemption and the existence of "anti-preemptive" provisions are separate legal concepts deserving independent analysis). This truism is more clear where anti-preemption language is viewed to the exclusion of express preemption language in the same statute.

Bank, 781 F.2d 440, 442 (5th Cir.), reh. and reh. en banc den., cert. den., 476 U.S. 1159 (1986). The doctrine "should not prevail when a nonexclusive reading serves the purposes for which the statute was enacted or allows the exercise of incidental authority necessary to an expressed power or right." Bailey v. Federal Intermediate Credit Bank, 788 F.2d 498, 500 (8th Cir.), reh. and reh. en banc den., 479 U.S. 915 (1986), citing 2A Sutherland Statutory Construction §47.25 (Sands 4th ed. 1984 rev.) at 209.

Far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context.

U.S. v. Castro, 837 F.2d 441, 442-43 n.2 (11th Cir. 1988), citing R. Dickenson, The

Interpretation and Application of Statutes, 234-35 (1975). The Wisconsin court perfunctorily applied the maxim in such a way as to dictate the "clear intent" of the statute, much in the same way the proverbial tail wags the dog.

Fifth, that the term "States" should be presumed in preemption cases to include their political subdivisions should be especially true under the Supremacy Clause analysis that compels respect for the role of states in our federal system, which includes the right of states to create, empower and utilize local governments as arms of the states for fulfilling state policy.<sup>8</sup> It is just as plausible, if not more so, to conclude Congress contemplates "States" to include all of their political subdivisions, including their departments, "state agencies," and local governments that act as the arms of the state, than to assume

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<sup>8</sup>See discussion starting at 90.

the opposite. Deukmejian, 683 P.2d at 1160. Even if not, under the preemption analysis this should be the presumption unless clearly shown otherwise.

F. The Legislative History of FIFRA Does Not Demonstrate A Clear Congressional Intent To Preempt Local Regulation Of Pesticide Use.

1. The Wisconsin Supreme Court applied a fundamentally flawed test on preemption by requiring a showing that Congress did not allow local regulation of pesticide use.

A plain reading of FIFRA §24(b) leads to the conclusion that municipalities enjoy the same "anti-preemption" condition as states under §24(a), while exclusion of municipalities from the definition of "State" causes an absurd result when applied to §24(b). Thus, "[v]ery strong evidence or explicit language from legislative history is necessary to overcome the plain meaning naturally to be drawn from the language of the statute." In re Seidel, 752 F.2d 1382, 1385 (9th Cir. 1985).

The Wisconsin court found a "clear" intent to preempt by applying a fundamentally flawed preemption analysis to the legislative history of FIFRA so as to turn long-standing Supreme Court preemption law on its head.

The Wisconsin court cites at 154 Wis. 2d at 31-32, 452 N.W.2d at 560-61, as a cornerstone of its holding the following passage from Maryland Pest Control, 646 F. Supp. at 113:

Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between the two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation.

(Emphasis added.) The clear error in this analytical approach is that the issue in federal preemption cases is not, as the district and Wisconsin court couched it,



whether "the legislation as finally enacted did not include the proposed language . . . which would have authorized local pesticide regulation." Absent clear preemption, Wisconsin local governments were already authorized by the state to regulate in the field.<sup>9</sup> The rule not applied by these courts remains whether the intent to preempt authority already possessed by states and local governments clearly was preempted. Hillsborough, 471 U.S. at 715. This is the same argument made and rejected by this Court in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255, reh. den., 465 U.S. 1074 (1984):

Kerr-McGee focuses on the differences between compensatory and punitive damages awards and asserts that, at most, Congress

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<sup>9</sup>Cities, villages and towns (including the Town of Casey) are authorized to exercise the police powers of the state under Wis. Stat. §§62.11(5) (cities), 61.34 (villages) and 60.22(3) (towns). Mortier, 154 Wis. 2d at 21, 452 N.W.2d at 556; Hack v. City of Mineral Point, 203 Wis. 215, 218, 233 N.W. 82, 84 (1931).

intended to allow the former. This argument, however, is misdirected because our inquiry is not whether Congress expressly allowed punitive damages awards. Punitive damages have long been a part of traditional state tort law. . . . Thus, it is Kerr-McGee's burden to show that Congress intended to preclude such awards.

(Emphasis added.)<sup>10</sup>

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<sup>10</sup>This case should not create the "tension" between federal and state regulation in the same field as was seen in the case of Silkwood v. Kerr-McGee, 464 U.S. at 256 (Blackmun, J., dissenting at 259). This is not even an arguable case in which, "[w]here broad federal preemption has been found, the burden of proving an exception always should be on the party who wishes to rely on state law," 464 U.S. at 279, 464 U.S. at 274 n.1 (Powell, J., dissenting). The federal law at issue in Silkwood is significantly different from the law here. Most significantly, the federal act in that case evinced a clear Congressional intent that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." 464 U.S. at 249, citing Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983). See also, 464 U.S. at 259-60, 263; (Blackmun, J., dissenting); 461 U.S. at 274, 279 (Powell, J., dissenting). Here, no broad intent to preempt exists in the federal law in question, and so the burden remains, even for the dissenting Justices in Silkwood, on those arguing (continued...)

2. FIFRA's legislative history demonstrates the full Congress agreed to disagree on preemption of local regulation of pesticide use.

The Wisconsin Supreme Court majority found that the words in the federal act are unclear on the issue of local preemption. Mortier, 154 Wis. 2d at 25, 452 N.W.2d at 557-58. It also recognized that the Congress fervently debated but failed to

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<sup>10</sup>(...continued)

preemption. Unlike the Atomic Energy Act reviewed in Silkwood, FIFRA §24, 7 U.S.C. 136v, clearly evinces the intent not to preempt the entire field of pesticide regulation [§24(a)], leaving open the entire area to state (and local) regulation, expressly preempting only specifically limited areas such as pesticide labelling and packaging [§24(b)]. Thus, our case does not present the issue that split the Court in Silkwood. Because of this important difference, in our case it should not be troubling for the Justices who dissented in Silkwood to hold, as dissenting Justice Powell interpreted the majority's holding there, that the burden that must be met here is "to allow state law to prevail in the absence of a showing that Congress expressly had intended to pre-empt it." 464 U.S. at 279 (Powell, J., dissenting). The analysis to be followed here remains compatible with both the majority and dissenting views on preemption expressed in Silkwood.

expressly preempt local governments from regulating pesticides. Mortier, 154 Wis. 2d at 25-28, 452 N.W.2d at 558-59. See also id., 154 Wis. 2d at 39-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting). The Wisconsin court derived a "clear" intent in FIFRA to preempt local regulation of pesticides primarily from legislative history, the interpretation of which numerous courts and justices differ.

Besides Wisconsin, at least

[f]our other courts have examined the legislative history of FIFRA that the majority contends is "abundantly clear," majority op. pp. 25-26, and reached conflicting interpretations of Congressional intent. . . . Put in their best light, these cases suggest that the legislative history surrounding the enactment of FIFRA is ambiguous: courts reading the same documents have reached different conclusions.

Mortier, 154 Wis. 2d at 39, 452 N.W.2d at 564 (Abrahamson, J., dissenting).

An essential difference between the courts and judges that are split on the

preemption question is that those finding preemption reviewed the legislative history and approached the issue from the standpoint of whether Congress authorized local governments to regulate pesticides, Maryland Pest Control, 646 F. Supp. at 113; Mortier, 154 Wis. 2d at 27-32, 452 N.W.2d at 559-61, while those finding against preemption approached the issue from the standpoint of whether Congress clearly intended to preclude the exercise of retained authority. For example, see Deukmejian, 683 P.2d at 1158-61; Lebanon, 571 A.2d 1192-93. The latter is the correct analytical approach. Silkwood, 464 U.S. at 255.

An important fact discounted by the Wisconsin majority was that congressional committees and legislators confronted head-on the policy question whether local governments should be preempted from regulating pesticides. At the end of exhaustive debate and effort, the pre-

emption proponents failed to obtain from the full Congress an express provision or other amendatory language in FIFRA's preemption section to clearly limit or qualify the authority already possessed by municipalities to act in the field. See Mortier, 154 Wis. 2d at 41-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting), 154 Wis. 2d at 49, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

Instead, the court relied heavily on separate congressional committee interpretations of bills that preceded the Conference Committee version ultimately adopted by the full Congress. Although the Conference Committee bill voted on by the full Congress admittedly "did not consider the issue of local regulation of pesticides," Mortier, 154 Wis. 2d at 28, 452 N.W.2d at 559, the court found a clear intent to preempt from the previous separate



committee actions and statements of individual legislators.

There appears no better rendition of FIFRA's legislative history, and proper application of traditional preemption analysis, than in Deukmejian, 683 P.2d at 1158-61. See also, Mortier, 154 Wis. 2d at 26-28, 452 N.W.2d at 558-59 (majority opinion), 154 Wis. 2d at 39-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting).

The House bill (H.R. No. 10729, 92nd Cong., 1st Sess. (1971)) did not address local preemption. Although the House Committee on Agriculture's initial report rejected a proposal that would have permitted political subdivisions of states to regulate pesticides (117 Cong. Rec. 40027 (1971)), it did not state that the bill's provisions should be understood to deprive political subdivisions from regulating pesticides. (H.R. Rep. No. 92-511, 1st Sess. at 16 (1971).) (Consistent with the

ordinary view that states are free to distribute regulatory power between themselves and their political subdivisions, the proposal was unnecessary because political subdivisions already had this authority. In the preemption analysis, the failure to authorize states or local governments through "anti-preemption" provisions does not result in preemption.) The Senate Agriculture and Forestry Committee reported the House bill out, saying in its report that, by not expressly providing regulatory authority to local authorities, it is the intent of the law to deprive local governments of this authority. (Sen. Rep. No. 92-838, 2d Sess. (1972) reprinted in 1972 U.S. Code Cong. & Admin. News, No. 3, 3993 at 4008.) The Senate Commerce Committee amended the bill assigning to local governments the authority to regulate the sale or use of pesticides. (Sen. Rep. No. 92-970, 2d Sess. (1972)

reprinted in 1972 U.S. Code Cong. & Admin. News, No. 3, at 4128.) The Senate Agriculture and Forestry Committee objected to the Commerce Committee amendments. (Pt. II, Sen. Rep. No. 92-838, 2d Sess. (1972) reprinted in 1972 U.S. Code Cong. & Admin. News, No. 3, starting at 4023.) The compromise substitute to the Commerce Committee, without the Commerce Committee's "anti-preemption" provision, was reported out without objection from the Agriculture and Forestry Committee (118 Cong. Rec. 32257-58 (1972)). The Senate passed H.R. 10729 without a dissenting vote (*id.*, at 32262 (1972)). The Conference Committee report, passed by both houses, was silent on the issue of local preemption (*id.*, at 33924, 35546). Deukmejian, 683 P.2d at 1158-59.

In Deukmejian, the court properly rejected the notion that even the failure of congressional committees to adopt language

authorizing local governments to regulate can serve as a substitute for statutory language depriving them of such authority. "The report of the House Committee on Agriculture did not state that political subdivisions should be prohibited from regulating but only that they should not be authorized to regulate." *Id.* at 1160 (emphasis added). "The history of the Senate proceedings establishes only that there was a compromise and that under that compromise the Committee on Commerce's intention to authorize local government regulation was rejected." *Id.* at 1161 (emphasis added).

The court also recognized that the full Congress voted on a Conference Committee bill that was silent on preemption.

The Conference Committee Report did not comment on the language giving states power to regulate, and there is no reason to conclude that the subsequent House approval of the Conference Committee Report reflected an understanding that the provision

giving the states power to adopt more restrictive regulation impinged upon the states' authority to delegate powers to local agencies.

Id. at 1160-61.

The courts in Maryland Pest Control, 646 F. Supp. at 113, and the Wisconsin Supreme Court, Mortier, 154 Wis. 2d at 28, 452 N.W.2d at 559, noted that on the floor of the Senate, Senator Allen inserted in the Congressional Record a portion of the Agriculture and Forestry Committee report which included the statement that FIFRA "should be understood as depriving" local governments of regulatory authority. It must first be said that it is a legislature's responsibility to enact legislation, and not for its committees or individual legislators to interpret it.<sup>11</sup>

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<sup>11</sup>In Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24, reh. den. (1976), (citations omitted), the Court there said:

Remarks of this kind made in the course of legislative debate or  
(continued...)

A committee report interpretation of a previous bill by a group of legislators is a frail substitute for insertion of an express amendment in legislation that is later voted on.<sup>12</sup> Referring to Senator

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<sup>11</sup>(...continued)  
hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight. . . . This is especially so with regard to the statements of legislative opponents who "[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach."

"And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980).

"Also, legislators' remarks during a floor debate, even in the Congress that enacted the legislation, do not control statutory interpretation and generally are not accorded significant weight." Blitz v. Donovan, 740 F.2d 1241, 1247 (D.C. Cir. 1984) (citations omitted).

<sup>12</sup>"Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." Thompson  
(continued...)



Allen's maneuver, Wisconsin's dissenting Justice Abrahamson observes,

the majority opinion relies upon language added to the congressional record immediately prior to the final vote of the Senate to support its finding of preemption. . . . Upon examination of the Congressional Record, I find that the language relied upon by the majority opinion is simply a restatement of the report of the Senate Committee on Agriculture and Forestry already cited by the majority. . . . For the reasons previously set forth, the Committee report is a questionable indication of congressional intent regarding the preemption of local regulation of pesticides.

Mortier, 154 Wis. 2d at 43, 452 N.W.2d at 565-66 (citations and footnote omitted).

<sup>12</sup>(...continued)

v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring). "Although individual committee recommendations may be persuasive, they do not dictate what the intent of the law is when it is adopted by the full Congress. That Congress debated the issue at great length without providing clear indications of preemption leads to the conclusion that no federal preemption was intended." Mortier, 154 Wis. 2d at 49, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

What the Senator inserted into the Congressional Record was not a part of the legislation adopted by the Senate, let alone both houses, and so cannot expressly preempt local regulation. What the record does show is Senator Allen did not insert clear preempting language in the law. At best, his maneuver might reflect a Senate interpretation of the first compromise bill which made no mention of either preemption or specific authorization of local regulation. Moreover, it was not agreed upon by the House and so cannot suggest the intent of the whole Congress to preempt local regulations.

There was a further Senate/House conference whose final result became the compromise FIFRA law. In it there was express language on preemption, and no language regarding specific preemption of local regulation. What was passed by both houses was legislation with no specific

reference to either local preemption or authorization, and a conference report which did not even mention the question of local regulation. Mortier, 154 Wis. 2d at 28, 452 N.W.2d at 559; Deukmejian, 683 P.2d at 1160-61.

The most solid conclusion here is that there was no agreement to clearly preempt local authority. "The record of House proceedings fails to reflect any understanding that local regulation was prohibited." Deukmejian, 683 P.2d at 1160. The Senate Agriculture and Forestry Committee could not get preemption language into the law, and the Senate Commerce Committee could not get specific authority language into the law. Both possibilities were considered, but neither was enacted into law. Without agreement, there can be no Congressional intent to preempt.

Rather than indicating that the group intended FIFRA to preempt local action, the more plausible explanation is that Congress

never resolved the issue of preemption. In the interest of reporting a bill in the current session of Congress, members of both Senate committees agreed to disagree on the issue of preemption of local regulation.

. . . .

. . . Congress worked for nearly two years attempting to forge the delicate compromise necessary to pass a pesticide bill. The bill was considered highly controversial and was at risk of being defeated at nearly every turn. A number of speakers, including then Senator Gaylord Nelson of Wisconsin, rose to speak on the highly partisan nature of the debate and the fragility of the compromise reached on all sides. In this turbulent political environment, the Senate never specifically considered the issue of preempting local governmental power, suggesting that the issue was not reached in the interest of passage of a pesticide bill.

The legislative history and the highly partisan nature of the debate suggest that Congress was unable to agree about preemption of local regulation. While the compromise struck in FIFRA may have been necessary to ensure passage of the bill, I do not think that it demonstrates Congressional intent with sufficient certainty to deprive the citizens of the Town of Casey

of the power to protect themselves and their environment.

Mortier, 154 Wis. 2d at 42-43, 44, 452 N.W.2d at 565-66 (Abrahamson, J., dissenting) (footnotes omitted).<sup>13</sup>

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<sup>13</sup>At Mortier, 154 Wis. 2d 30 n.17, 452 N.W.2d at 560 n.17, the Wisconsin majority opinion adds as "indicative of the EPA's authoritative construction of the congressional intent of FIFRA to exclude pesticide regulation below the state level"; this comment:

Moreover, the commentary to federal regulations promulgated pursuant to FIFRA, although after the fact of congressional action, expresses the administrative determination of the EPA that "It is not the intention of the Act or of these regulations to authorize political subdivisions below the State level to further regulate pesticides." 40 Fed. Reg. 11700.

Mortier, 154 Wis. 2d at 30, 452 N.W.2d at 560. This bald conclusion is merely an agency comment unaccompanied by any rationale and appears only in a section analyzing a proposed agency rule governing state certification of pesticide applicators. This is hardly worthy of consideration in a case where sovereign state powers are at stake and respondents seek blanket preemption of any and all local regulation of pesticides.

Given the tremendous doubt that exists within the legislative history of FIFRA regarding the intent of the full Congress to preempt local regulation of pesticide use, that doubt must be resolved in favor of municipalities acting under their delegated state authority.

G. There Is No Implied Preemption Of State Or Local Units Of Government In The Federal Regulatory Scheme.

1. Because federal regulation of pesticides is not comprehensive or adequate, there is no inference to be made of a congressional intent to preempt local governments in the field.

Even though the Wisconsin Supreme Court "majority opinion does not rest on the premise that FIFRA is pervasive and thus occupies the field," Mortier, 154 Wis. 2d at 38 n.3, 452 N.W.2d at 563 n.3 (Abrahamson, J., dissenting), the court invoked as part of its rationale for finding preemption City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 633, as "illustrative of this type



of determination of congressional intent to preempt from the pervasive nature or completeness of the examined congressional scheme." Mortier, 154 Wis. 2d at 22-23, 452 N.W.2d at 557. The court's misplaced invocation of Burbank<sup>14</sup> came at the invitation of respondents who have repeatedly alleged pesticide regulation is "comprehensive" and "extensive," and needs sufficient uniformity to be effective.<sup>15</sup>

From these characterizations, respondents implicitly invite the Court to

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<sup>14</sup>Mortier, 154 Wis. 2d at 36-38 n.3, 452 N.W.2d at 563 n.3 (Abrahamson, J., dissenting); Hillsborough, 471 U.S. at 717-18.

<sup>15</sup>Respondents' Brief In Opposition To Petition For Writ of Certiorari at 18-20. Such factual allegations in briefs are improper, especially on a motion for summary judgment where such allegations were not made or proven, were disputed by defendants in their pleadings and briefs, and where they go to an implied claim of unreasonableness--a challenge that was not raised or made by plaintiffs-respondents in their motion. Because the claims raise issues of disputed fact, they are wholly inappropriate, aside from being incorrect.

accept unfounded and disputed factual and policy assumptions that because there are numerous pages of federal and state regulations, already there must be adequate regulations to protect citizens and the environment from the toxic effects of pesticides.

Such claims, if this Court were tempted to entertain them, are not only disputed by petitioners (and thus are not proper for consideration on this appeal), but simply are not true. Federal and state regulation of pesticides is not "extensive" or "comprehensive." Petitioners remain prepared to show the courts, if necessary, the regulatory gaps left open in both the state and federal pesticide regulatory "scheme." We are also prepared to show the inadequacies in the enforcement and administration of those laws, as well. These gaps and inadequacies pose, we would show, that the public, including Town of

Casey residents, and the environment, such as our groundwater, are and continue to be exposed to serious and significant risks from the harmful effects of pesticide chemicals.

It is these continuing risks that give rise to the legitimate right of local governments to address those unanswered risks at the local level.

Pesticides are chemicals or biological substances used to destroy or control weeds or unwanted plants, insect, fungi, rodents, bacteria, and other pests. Pesticides protect our food crops, non-food crops, ourselves, our homes, our pets and livestock. Pesticides are a mixed blessing: they contribute significantly to agricultural productivity and to improved public health through the control of disease-carrying pests, but they can adversely affect people, non-target organisms such as fish and wildlife, and the environment. Because pesticides are designed to kill and control living organisms, exposure to them can be hazardous. Some pesticides exhibit evidence of causing chronic health effects such as cancer or birth defects. Some pesticides persist in the environment over long periods of

time and accumulate in the tissues of people, animals, and plants.

General Accounting Office (GAO), PESTICIDES --EPA's Formidable Task To Assess And Regulate Pesticides (April 1986), page 10, attached to Public Intervenor Motion to Intervene (R. 6:1-13) as Exhibit F.

The above-cited 1986 report amounts to no less than an indictment of EPA's failure to fully register a single pesticide since FIFRA was amended in 1972. It states in part:

Most of the 50,000 pesticide products registered (licensed) for use today have not been fully tested and evaluated in accordance with current testing requirements. These tests are required to determine, among other things, a pesticide's potential for causing chronic (long-term) effects in humans, such as cancer and reproductive disorders, birth defects, and environmental damage. . . .

. . . .

At its current pace, EPA's reassessment and reregistration efforts will extend into the 21st century due to the magnitude and

complexity of the tasks involved. Until EPA completes this effort, the health and environmental risks and benefits associated with older pesticides and their uses will not be fully known.

. . . . .

As of March 31, 1986, EPA had not completed a final reassessment on any pesticide active ingredient--the first one is due by the end of the year. EPA has, however, completed preliminary assessments of 124 of the 600 active ingredients. Preliminary assessment means that EPA has evaluated the data on file and identified additional areas where testing may be needed to complete reassessment. . . . EPA plans to develop final reassessment after receipt and review of the required data. . . .

. . . . .

From the inception of the special review program in 1975 through October 31, 1985, EPA completed 32 special reviews. . . . However, EPA's special review process for dealing with pesticides where new evidence raises a concern about a significant health or environmental risk, has generally taken 2 to 6 years--contrary to EPA's goal of quickly making decisions on potentially hazardous pesticides. During this period, the public and the environment may be exposed to

potentially hazardous pesticides.  
. . . . .

EPA's reregistration effort is further complicated by emerging pesticide concerns. EPA has identified about 100 inert ingredients with known or suspected toxic concerns that need to be considered along with over 800 inerts for which EPA has insufficient data to determine potential hazards. EPA's ability to obtain data on inerts may be constrained by the pesticide law's restrictions on disclosing information on inerts, which are considered trade secrets. This legal constraint makes it difficult for interested chemical firms to avoid duplicative testing that may be required by EPA. . . .

Id. at 2-4 (emphasis added).

{ See also GAO, NONAGRICULTURAL PESTICIDES--Risks and Regulations (April 1986), attached to Public Intervenor Motion to Intervene (R. 6:1-13) as Exhibit G. In 1989, GAO provided Congress with an update on its 1986 reports, summarizing as follows:

Our follow-up work shows that EPA has not completely assessed any of the 822 pesticides subject to reregistration but is close on at least three. Thus, it has not completed all product



reregistration actions for any pesticide, although it has reregistered some products. In addition, EPA has been able to completely reassess the safety of pesticide residues on food for only 4 of the approximately 387 food-use pesticides subject to reregistration because of gaps in knowledge about the toxicity and exposure of most food-use pesticides. . . .

While FIFRA '88 will help accelerate EPA's review of older pesticides, reregistering pesticide products and reassessing tolerances remain formidable tasks.

Testimony, Statement of Peter F. Guerrero, Associate Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, GAO, Before the Subcommittee on Toxic Substances, Environmental Oversight, Research and Development Committee on Environment and Public Works, United States Senate (May 15, 1989), at 1-2.<sup>16</sup>

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<sup>16</sup>Petitioners would be pleased to present this document to the Court and the parties on request.

In a more recent report on lawn care pesticides, GAO states:

As with most pesticides, these chemicals have the potential to create serious problems affecting human health and the environment. The range of concerns about the risks of pesticides has expanded to include potential chronic health effects, such as cancer and birth defects, and adverse ecological effects. Currently, these pesticides are being applied in large amounts without complete knowledge of their safety. . . .

Last May GAO testified before this Subcommittee on the status of EPA's reregistration program and concluded that EPA had not made substantial progress in reassessing the risks of pesticides. . . .

Of the 34 most widely used lawn care pesticides, 32 are older pesticides and subject to reregistration. Not one of these, however, has been completely reassessed. . . . Until EPA completes its reassessments and takes appropriate regulatory action, the public's health may be at

risk from exposure to these pesticides.

GAO, LAWN CARE PESTICIDES--Risks Remain Uncertain While Prohibited Safety Claims Continue (March 1990) at 2, 3, 5.<sup>17</sup>

At the state level, see Wisconsin Legislative Audit Bureau Report 86-20, A Management Audit of Department of Agriculture, Trade and Consumer Protection (DATCP) (June 1986), attached to Public Intervenor Motion to Intervene (R. 6:1-13) as Exhibit H, which states DATCP's pesticide regulation "program is seriously weakened because of deficiencies in . . . the timely and effective resolution of pesticide misuse complaints." Id. at 3. The report stated "concerns about the thoroughness and completeness of the investigative work done by some inspectors" and "inadequate supervisory review of investigation reports

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<sup>17</sup>Petitioners would be pleased to provide copies of this report to the Court and the parties on request.

is at least responsible for fieldwork deficiencies." Id. In addition, the auditors "are concerned that the central office is not fully meeting one of its most important responsibilities, to quickly and effectively resolve pesticide complaints." Id. Numerous case files were examined and cited as examples of inadequacies in Wisconsin's pesticide enforcement program.

It is because federal and state regulation of pesticides has been shoddy at worst, incomplete and overburdened at best, incapable of addressing pesticide risks at the local level, that it is crucial states retain the authority to delegate to local governments the power to protect citizens from pesticide hazards.

2. Federal regulation of pesticides is not comprehensive or pervasive.

The Town of Casey ordinance fills glaring gaps that neither federal nor state laws address. It provides a rational,

deliberate, informed decision-making process to permit the use of pesticides in local areas after serious consideration of the specific pest problem, specific local conditions, and the need to use proposed pesticide chemicals in light of other chemical and non-chemical alternatives. Ord. No. 85-1 §1.3(2). Neither federal nor state laws do these things. In addition, it provides for reasonable conditions under which pesticides may be applied, and public notice so citizens may make informed choices about exposing themselves to treated areas. Ibid, §1.3(3)(4). Federal and state laws do not provide for these reasoned decisions to be made, nor the protections they afford. The local ordinance is complementary to the federal regulatory scheme and consistent with its purpose to protect public health and the environment.

Under the federal and state laws<sup>18</sup> no one is required under local circumstances to: 1) consider the risks to people and the local environment of using pesticides, and to compare them to the risks of not using them or using alternative pest control methods; 2) consider the effectiveness and risks of using alternative non-chemical methods and chemicals; 3) consider the risks of registered pesticides that have not been reregistered by EPA or which are undergoing "special review" because they are strongly suspected of causing unreasonable risks or harm to local humans or the environment; 4) consider the effects of the pesticides on local humans, animals, plants or the environment; or 5) implement added protections necessary to reduce or eliminate the risks of using pesticides under unique local conditions, such as timing of

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<sup>18</sup>See FIFRA [7 U.S.C. §§136-136y]; Wis. Stat. §§94.67-94.71 (1989); 40 C.F.R. subch. E (1990); Wis. Admin. Code ch. Ag 29 (1990).



applications. The Casey ordinance does these things, and without conflicting with federal or state regulations.<sup>19</sup>

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<sup>19</sup>Respondents' "conflict preemption" claim was not addressed by the Wisconsin Supreme Court, although it was acknowledged as follows:

Under the express words of the supremacy clause, state law must give way to contradictory or incompatible provisions of a congressional enactment. The plaintiffs assert that, in practice, that must be the result here, for on its face the Town of Casey ordinance could prohibit completely the use of FIFRA-approved pesticides by FIFRA-approved label instructions. While, as a matter of law, we do not disagree with the plaintiffs' premise, the situation in light of the record is a hypothetical one, for no such complete prohibition is posed by the facts, and we need not address the plaintiffs' assertion in light of our reliance on the legislative history, which we conclude demonstrates a clear and manifest congressional intent to preempt all local regulation.

Mortier, 154 Wis. 2d at 23-24, 452 N.W.2d at 557. There are two reasons this conflict preemption claim must fail. First, as dissenting Justice Steinmetz points out, "[n]o affirmative license or general permit (continued...)"

Unless the Wisconsin Supreme Court decision is reversed, all local units of government will be hamstrung in their ability to carry out their deep-rooted responsibilities of protecting their citizens' health, safety and local environments from the real hazards of toxic chemical pesticides.

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<sup>19</sup>(...continued)  
has been issued for pesticides by the state or federal government" by virtue of mere pesticide registration. Id. at 45, 452 N.W.2d at 566-67. Thus, local regulation does not interfere with any overriding federal policy favoring pesticide use. Second, because FIFRA §24(a) expressly contemplates states as being able to regulate "use of any federally registered pesticide (emphasis added)," there can be no conflict when registered pesticides are regulated. Cf. Rominger, 500 F. Supp. at 471; Ferebee, 736 F.2d at 1541; Southern Pacific, 325 U.S. at 769. This brings us full circle back to the implied preemption issue whether Congress clearly intended local governments to be preempted from regulating use of registered pesticides under FIFRA §24.

3. Comprehensiveness of federal regulation is not indicative of congressional intent to preempt state or local regulation in the same field.

Even if federal regulation of pesticides were comprehensive, this Court has rejected the notion that congressional intent to regulate comprehensively in a field evinces a clear and manifest intent to preempt state and local regulation.

No better case illustrates this than the United States Supreme Court's decision in Hillsborough, where the Court upheld local regulation of blood plasma centers and the procedures for assuring wholesomeness of blood supplies. Despite comprehensiveness of the congressional statute and federal regulations governing activities in the same field, the Court refused to find congressional or agency preemption of the ordinance. The Court stated:

We are even more reluctant to infer pre-emption from the comprehensiveness of regulations

than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. See Jones v. Rath Packing Co., 430 U.S., at 525, 97 S.Ct., at 1309.

. . . Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety.

Id., 471 U.S. at 717-18. The Court also rejected the dominant-federal-interest-in-the-field argument.

We are unpersuaded by the argument. Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all

related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of "importance" and hold that, for those at the top of the scale, federal regulation must be exclusive.

471 U.S. at 719. Unlike the federal government's dominant interest in foreign affairs, "those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily, and historically, a matter of local concern. See Rice v. Santa Fe Elevator Corp., 331 U.S., at 230, 67 S.Ct., at 1152." Id. Given that there was no clear indication of federal intent to preempt, and the deference with which the Court reviews challenged ordinances, the Court concluded these ordinances were not preempted by the comprehensive federal scheme. Id., 471 U.S. at 716, 719.

H. The Wisconsin Decision Puts FIFRA In Conflict With The Drinking Water Act And Federal Programs That Encourage Local Regulation Of Pesticides To Protect Groundwater.

As a result of the Wisconsin, sixth circuit and Maryland federal court decisions preempting local governments from regulating pesticide use, states and local governments are getting diametrically opposed messages from Congress and the federal government on protection of groundwater from pesticides. Such inconsistency should be taken into account and avoided under the judicial rule of statutory construction, consistent with the Supremacy Clause and Tenth Amendment analyses, that "where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) (emphasis added); citing Regional Rail



Reorganization Act Cases, 419 U.S. 102, 133-134 (1974); quoting Morton v. Mancari, 417 U.S. 535, 551 (1974).

On the one hand the Wisconsin court decision predictably will be interpreted to mean that under FIFRA local governments may not protect the health, safety and welfare of their citizens from pesticides, even where the object of the regulation is to protect from pesticide contamination groundwater supplies that serve the drinking water, domestic use and environmental needs of affected communities.

On the other, the federal government has sent strong messages to the states and local governments that they, not the federal government, must take the lead role in protecting local groundwater supplies from pesticides. FIFRA itself, although not mentioning groundwater specifically, implies that local governments are authorized to adopt pesticide regulatory laws, such as to

protect local ground and drinking water supplies, for which the goal of cooperative uniformity is to be sought. 7 U.S.C. § 136t(b). More specifically, the Safe Drinking Water Act Amendments of 1986 require the states to develop programs "to protect wellhead areas within their jurisdiction from contaminants which may have any adverse effect on the health of persons." 42 U.S.C. §300h-7(a) (1988).<sup>20</sup>

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<sup>20</sup>Respondents, in their brief in opposition to the petition for certiorari at 20, state, "Petitioners raise a new issue not presented in the Wisconsin courts, by claiming that the preemption of local regulations presents a conflict with the federal Safe Drinking Water Act."

First, petitioners did not discover this issue until the time of the petition for certiorari preparation.

Second, the policy that compels the need to reconcile the operation of laws so as to avoid conflicts between them and to allow their full operation overrides any convenient argument of "waiver," especially where the issue is purely one of law and the parties are not prejudiced in the least because of the full opportunity to brief the issue. United States v. Speers, 382 U.S. 266, 277 n.22 (1965).

The programs are required "to specify the duties of . . . local governmental entities, and public water supply systems," §300h-7(a)(1), and must contain, among other things, "implementation of control measures . . . to protect the water supply within wellhead protection areas from such contaminants." §300h-7(a)(4). Local governments are hardly in a position now to implement zoning or other regulatory control measures to protect groundwater in wellhead protection areas from pesticides under the recent ruling by the Wisconsin Supreme Court.

This is particularly disturbing given the deeply rooted interests of the states and local governments in protecting their citizens' safety, Hillsborough, 471 U.S. at 719; Brown v. Hotel & Restaurant Employees, 468 U.S. 491, 502 (1984), from toxic pesticides.

"Pesticide pollution of ground water has recently become a major issue in the United States." Osteen, C., et al., Agricultural Pesticide Use Trends and Policy Issues, United States Department of Agriculture, Agricultural Economic Report No. 622 at 48 (September 1989).<sup>21</sup> "With over 50 percent of the nation's population relying on ground water for their drinking water source, we cannot underestimate the seriousness of pesticides occurring in ground water." E.P.A. Office of Pesticide Programs, Pesticides In Ground Water Data Base 1988 Interim Report at 1-7 (December, 1988).<sup>22</sup> "In 1987, the U.S. Environmental Protection Agency documented 19 pesticides occurring in ground water from 24 states

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<sup>21</sup>Petitioners would be pleased to provide copies of this document to the Court and the parties on request.

<sup>22</sup>Petitioners would be pleased to present this document to the Court and the parties on request.

attributed to agricultural practices." Ibid  
(citation omitted).

Nielsen and Lee estimated that 1,128 counties had potential pesticide contamination of ground water. Approximately 46 million people use ground water that may be contaminated with pesticides. About 18 million people rely on private wells that are more susceptible to contamination than deeper, regulated public wells. Ground water in 1,437 counties, or about 46 percent of counties in the conterminous States, may be contaminated by pesticides or nitrogen fertilizers. . . . The ground water contamination potential is especially acute in regions of the Corn Belt, Lake States, eastern seaboard, and gulf coast. . . . The EPA is proposing plans that emphasize State management of ground water problems. . . .

Osteen, at 48. Indeed, Wisconsin has taken up the invitation by enacting a comprehensive groundwater law, 1983 Wisconsin Act 410, which in sections 19,<sup>23</sup>

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<sup>23</sup>See Wis. Stat. §59.97(1) (1989).

20<sup>24</sup> and 21<sup>25</sup> amend local police power statutes "to encourage the protection of groundwater resources." "Since it is reasonable to assume municipalities may act to protect groundwater supplies, it would be an anomaly to find that these same municipalities cannot act to also protect their food supplies, homes, work and recreational areas from pesticide contamination." Mortier, 154 Wis.2d at 52-53, 452 N.W.2d at 570 (Steinmetz, J., dissenting).

In Ruckelshaus, the Court found it "entirely possible for the Tucker Act and FIFRA to co-exist." 467 U.S. at 1018. Under the rules governing both the traditional statutory interpretation and Supremacy Clause analyses, the wellhead protection provisions of the Safe Drinking

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<sup>24</sup>See Wis. Stat. §60.74(1)(a)7 (1989).

<sup>25</sup>See Wis. Stat. §62.23(7)(c) (1989).



Water Act that encourage state and local governments to protect groundwater supplies from pesticides should not be in potential conflict with FIFRA.

Federal agencies, acting under their congressionally delegated authority, are sending an equally clear message to state and local governments to protect their groundwater supplies from pesticides.

In August 1984 the U.S. EPA Office of Ground-Water Protection published its Ground-Water Protection Strategy.<sup>26</sup> There, EPA identified pesticides as a significant source of groundwater contamination. Id. at 13, 15. EPA's strategy for protecting groundwater contemplates states and their local governments taking the lead protection role, with the EPA providing technical and financial support. Id. at 33-52. "EPA believes that the most effective and broadly

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<sup>26</sup>Petitioners would be pleased to present this document to the Court and the parties on request.

acceptable way to strengthen institutional capability to protect (ground) water is to strengthen State programs." Id. at 35. In turn, state programs include a strong local government role.

Local governments can also play a major role in ground-water protection. They derive their authorities from State environmental statutes or from related, powerful authorities, such as those to protect public health and to control land use. . . .

Id. at 23 (emphasis added). In its follow-up report specifically dealing with protection of groundwater from pesticides, the EPA more directly enunciated the local role it contemplated as part of the national strategy.

Since pesticides are a potential source of contamination for public water supply wells and critical aquifer protection areas, EPA anticipates that many State and local governments will seek to develop programs that address this source. . . .

. . . .

The Agency recognizes that technical information on practices to reduce these risks is needed to help in the design and implementation of programs addressing pesticide contamination at the State and local levels.

EPA Office of Ground-Water Protection, Protecting Ground Water: Pesticides and Agricultural Practices (1988) at 3 (emphasis added).<sup>27</sup>

The traditionally "powerful authorities" of local governments to protect their citizens from pesticide contaminated ground and drinking water supplies will be largely eviscerated if local governments are preempted from regulating pesticides as part of their groundwater protection schemes. More significantly, the messages being received by local governments from the federal government on protecting groundwater from pesticides is now inconsistent and

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<sup>27</sup>Petitioners would be pleased to present this document to the Court and the parties on request.

confused. This absurd result should have been avoided by interpreting FIFRA consistent with the retention of the states' right to delegate pesticide regulatory authority to their local governments.

- I. Under the Supremacy Clause Analysis, Where The Congress Expressly Allows States To Retain Their Authority To Regulate In A Particular Field, The Contrary Intent To Preempt The States From Delegating Their Authority Within That Field To Their Local Governments Should Be Equally Clear.

The Wisconsin Supreme Court held that by expressly not preempting state regulation of pesticide use under FIFRA §24 [7 U.S.C. §136v], Congress impliedly denied permission to the states to delegate that same authority to their local governments. As a result, no longer is the question in preemption cases whether a federal law clearly preempts the states along with their local governments from acting in a field, e.g., see Hillsborough, 471 U.S. at 712; Garcia v. San Antonio Metro. Transit Auth., 469 U.S.

528, 575, reh. den. (1985); Deukmejian, 683 P.2d at 1160, 1161. Now it is whether federal laws, even where they expressly allow the states to act, may be implied to have preempted the states from delegating to their local governments without the equally "clear and manifest purpose of Congress" already expressed.

We respectfully ask this Court to hold that where the Congress with one hand expressly permits the states to act in a particular field, and where states are ordinarily free to distribute their regulatory authority to their political subdivisions, the "clear and manifest purpose" test behind Supremacy Clause jurisprudence should require that the intent to take back that authority with the other hand be equally clear through express preemption. Anything less will continue to

result in the confusion on the issue that now reigns in the nation's courts.<sup>28</sup>

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<sup>28</sup>The very idea in preemption law of "implied intent that is clear and manifest" is itself oxymoronic, and difficult to administer. By definition, intent that can only be discerned by implication is unexpressed, and therefore not necessarily clear. The split by the courts trying to apply the concept is ample evidence of its mischief.

If the law of "clear and manifest" preemption that respects the role of states and local governments in our federal system is to have meaning, then where the Congress specifically expresses in a law its intent to preempt, and does so as specifically and carefully as it did in FIFRA so as to broadly allow states to act in the field, that expression of intent should be considered to be complete, if not conclusive. In such cases, no contrary intent to preempt states from delegating otherwise permissible duties and authorities to their local governments should be invented by resort to matters outside the statute in which the express preemption provisions appear. This is not to be taken to suggest that conflict preemption be abandoned. It is merely to recognize that because Congress has the means by which to make its preemptory intent clear in the laws it enacts, it is not asking much for that intent to be made clear through its unambiguous expression.



J. If Left Intact, The Wisconsin Supreme Court Decision Forces The Issue Whether, Under Fundamental Principles Of Federalism Embodied In The Tenth Amendment, FIFRA May Be Interpreted To Prevent The States From Delegating Authority Within Their Own Governmental Structures.

As in all the other cases decided and pending on the federal preemption question presented here, there is no "intimation that the state of Wisconsin or its political subdivisions lack the police power to enact pesticide regulations." Mortier, 154 Wis. 2d at 21, 452 N.W.2d at 556.

The Wisconsin Supreme Court's holding, and those like it, necessarily presume that as Congress allowed the states to continue exercising their authority in the field, Congress at the same time may and did retain control as to how the states may exercise this retained power.

The Wisconsin Supreme Court decision brings us perilously close to the fundamental constitutional issue whether the

Congress may, consistent with fundamental principles of federalism embodied in the Tenth Amendment, tell the states how they may delegate authority within their own governmental structures.<sup>29</sup>

Although it was the view of four dissenting Justices of this Court in Garcia, 469 U.S. at 560, that the Court's "decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause," 469 U.S. at 560 (Powell, J., with whom the Chief Justice, Rehnquist, J., and O'Connor, J., joined, dissenting), even the majority of the Court observed looking beyond that case: "If there are to be limits on the Federal

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<sup>29</sup>In Deukmejian, the California Supreme Court acknowledged the same issue, but avoided it by holding that because local governments were not preempted from regulating pesticide use under FIFRA, "[t]his conclusion makes it unnecessary to determine whether Congress could validly limit the power of the state to distribute internally its traditional powers of regulation." 683 P.2d at 1161 n.11.

Government's power to interfere with state functions--as undoubtedly there are--we must look elsewhere to find them." 469 U.S. at 547.<sup>30</sup> The Court may be confronted with the need to find one of those limits where, as in this case, an interpretation of FIFRA cannot be reconciled with the states' right to delegate and assign their police powers to their subdivisions.

Although the Court in Garcia rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" 469 U.S. at 546-47, the functions examined there did not go to the heart of state governmental structure or the

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<sup>30</sup>For example, the majority view in Garcia would still recognize a line of constitutional demarcation defining impermissible federal action where that action "is destructive of state sovereignty or violative of any constitutional provision." 469 U.S. at 554.

states' prerogatives of how to delegate the exercise of power within that structure. This case does. See Deukmejian, 683 P.2d at 1160-61. Regardless of the manner or standard by which the Court might revisit this issue within the factual context of this case, there is no more fundamental function of state government that deserves protection from federal intrusion than assigning duties and delegating police power authority to state subdivisions and local governments, Garcia at 575 (Powell, J., dissenting, discussion accompanying n.18); Deukmejian, 683 P.2d at 1158, 1160, 1161.<sup>31</sup> This Court has consistently held that a state is free to delegate any power it possesses under the Tenth Amendment to its political subdivisions. See generally, Buck v. California, 343 U.S. 99 (1952) (a state

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<sup>31</sup>For example, "it is for the states to determine whether their reserved powers shall be exercised directly, by political subdivisions, or by both." Deukmejian, 683 P.2d at 1161.

is free to delegate its legitimate police powers to its political subdivisions); Folsom v. Township Ninety-Six, 159 U.S. 611 (1895) (states are free to delegate lawful powers to political subdivisions).

There are many governmental structures and means available to the states to carry out legitimate state policies and objectives, not the least of which is the protection of public safety, health, and the environment from toxic pesticide chemicals. While some states may choose to assign state level agencies this task, others may find it more desirable to assign it to their local or regional subdivisions. Deukmejian, 683 P.2d at 1160-61. States may make this choice for various reasons including considerations of costs, existing governmental structures already carrying out similar functions, and political acceptability. No one knows more about these factors than state and local elected

or appointed officials.<sup>32</sup> For example, suppose a state were to choose to exercise its retained authority to regulate pesticide use by delegating exclusive authority or assigning duties to counties to carry out state policies, standards or programs.<sup>33</sup>

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<sup>32</sup>Powell, J., dissenting, Garcia at 574 n.18:

The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them. E.g., The Federalist No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961).

<sup>33</sup>"The science of government . . . is the science of experiment" in which the states should remain able to "serve as laboratories for social and economic experiment." Garcia, 469 U.S. at 546, citing Anderson v. Dunn, 6 Wheat. 204, 226, 5 L.Ed. 242 (1821), and New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). See also Garcia, 496 U.S. at 567 n.13 (Powell, J., dissenting). Since 1921, with the enactment of ch. 242, Laws of 1921, Wisconsin municipalities have had conferred  
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Under the Wisconsin Supreme Court holding, that option no longer appears to be available. Because FIFRA has been

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on them "all the powers that the legislature could by any possibility confer upon" them. Hack v. City of Mineral Point, 203 Wis. at 218, 219, 233 N.W. at 84. As a result, municipalities have been experimenting with the authority to form their own policies and laws to protect the health, safety and welfare of their citizens. Also starting at that time, Wisconsin has been conducting a government experiment in which municipalities have played key roles in carrying out state policies. Examples: local enforcement of traffic regulations in conformity with state standards (Wis. Stat. §349.06). Municipalities are being called on to execute state policies particularly relating to protecting statewide interests in water resources and the environment, while tailoring appropriate regulations to particular local needs and conditions. As examples, municipalities are charged under Wis. Stat. §§59.971, 61.351, 62.23(7), and 62.231, with the duty of enacting shoreland and shoreland-wetland zoning laws "[t]o aid in the state's role as trustee of its navigable waters and to promote the health, safety, convenience and general welfare, . . . for the efficient use, conservation, development and protection of this state's water resources." Wis. Stat. §144.26(1) (emphasis added). Similar state-local partnerships are established with respect to floodplain zoning (Wis. Stat. §87.30), and groundwater. Focusing on "the role local governments can play in a conjunctive state

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interpreted to have preempted local governments from regulating pesticides, the

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and local regulatory scheme to protect groundwater quality" in Wisconsin, Yanggen, D., et al., "Groundwater Quality Regulation: Existing Governmental Authority and Recommended Roles," 14 Colum. J. Envtl. L. (1989) at 6, observes:

Significantly, the new Wisconsin groundwater law (1983 Wis. Act 410) provides for three optional programs at the local government level which address the issues of land disposal of septage, county well code ordinances, and zoning to encourage the protection of groundwater. By providing for these local government programs, the legislature established a de facto state/local partnership in groundwater protection and thereby evinced an intention to allow local governments to share the responsibility for groundwater protection.

Ibid at 10 (footnotes omitted).

The evolving experimental use of local governments as instrumentalities of the state to carry out state policy is not merely an abstract concept. For the purposes of the analysis to be applied in this case, the state-local partnership is not merely to be presumed, but is very real and working in Wisconsin. It should be viewed as extraordinary for the Congress to say state governments may not continue it.

states necessarily have been deprived the option of assigning pesticide regulatory responsibilities to their local governments.<sup>34</sup> This occurs, ironically, under a federal law that expressly allows, as the Wisconsin court held, states to continue regulating pesticides.

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<sup>34</sup>Respondents argue in their brief in opposition to the petition for certiorari at 14-15, "there is nothing inappropriate or unusual about a Congressional scheme which preempts local regulation but leaves regulation at the state level intact," citing Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir.), reh. den., cert. den., 414 U.S. 855 (1973); Consolidated Rail Corporation v. Smith, 664 F. Supp. 1228 (N.D. Ind. 1987); Chesapeake & Ohio Railway v. City of Bridgman, 669 F. Supp. 823 (W.D. Mich. 1987). These cases do not stand for this proposition, are inapposite, distinguishable, and largely suffer from the same flawed reasoning utilized by the Wisconsin and Maryland courts.

First, while it is true the courts held under the federal law at issue there that, while states could enact regulations on railroad safety, local governments were preempted from doing the same, they did not address the potential constitutional problem posed here.

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The constitutional issue posed here could have been avoided had the Wisconsin Supreme Court abided by "the

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Second, the "railroad cases" were just that--cases dealing with a completely different federal railroad transportation safety statute. Unlike FIFRA, the federal railroad safety statute broadly preempted state and local regulation in the field, and created exceptions for narrow situations, thus prompting the kind of preemption analysis seen in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm., 461 U.S. 190, 212-13 (1983): "When the Federal Government completely occupies a given field or an identifiable portion of it, . . . the test of pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" Also, unlike FIFRA, the railway safety statute requires uniformity of regulation, but for the narrow exception where there is no conflicting federal regulation on the matter locally regulated. Bridgman, 669 F. Supp. at 825. This overriding congressional policy of uniformity drives the preemptive intent found by the courts in these cases. Id.; Donelon, 474 F.2d at 1112; Consolidated Rail, 664 F. Supp. at 1238. Dissimilarly, FIFRA §22(b) [7 U.S.C. §136t(b)] merely encourages uniformity.

Third, the Donelon and Bridgman courts superficially applied the "express mention, implied exclusion" rule to jump to the conclusion municipalities are not included

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"cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided."'" U.S. v. Security Indus. Bank,

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in the term "States" for the purpose of determining preemption under the express anti-preemption provisions in the law. In Bridgman, the court says,

The plain language of the exception, however, indicates that only a state may adopt a more stringent railway safety law in response to a local safety hazard. . . . Since municipalities are not included in this preemption exception, municipalities are preempted from passing more stringent train speed limits . . . .

669 F. Supp. at 826. As this definition of the term "State," used in the preemption exception rule of FIFRA §24(a), yields an absurd result when applied to the express preemption rule in FIFRA §24(b), so too this yields the same result when applied to the express provisions preempting state actions in the railroad statute, i.e., local governments could regulate where the states may not.

At least in the Consolidated Rail case, the judge implicitly rejected the simplistic line of reasoning in the other cases, and  
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459 U.S. at 78; citing Lorillard v. Pons, 434 U.S. 575, 577 (1978); quoting Crowell v. Benson, 285 U.S. 22, 62 (1932).

(...continued)  
understood that municipalities are creatures of state legislatures, often act as arms of the state, and normally should be included within the statutory contemplation of "State." "If the local ordinances conform with either of these provisions [exceptions], they will not be preempted." 664 F. Supp. at 1236. However, this court went on to hold that the local regulation in question could not coexist with existing federal regulations (conflict preemption). Id. at 1236-37. This court also looked to other indicia of state intent not to delegate railroad regulatory authority to local governments, and to other indicia of congressional intent to allow only state level governments to act within the non-preempted regulatory area. 664 F. Supp. at 1237. No similar indicia of preemptive intent are to be found in our case. For example, there is no mention in FIFRA, as in the rail statute, of state regulation by "law, rule, regulation, order or standard," found by the court in Consolidated Rail at 1237, to be indicia of state level agency actions allowed under the federal statute. The express preemptory provision in FIFRA §24(b) refers to labelling and packaging "requirements" that are preempted, and allowed regulation of "sale" and "use," all terms that can apply equally to local regulatory actions.

(...continued)



The constitutional issue still can and should be avoided by interpreting FIFRA in a manner that is consistent, and not on a collision course, with fundamental principles of federalism.

#### CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of Wisconsin and remand the matter with instructions to enter judgment in favor

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(...footnote continued)

The court also said that because municipalities are not mentioned in the rail statute, an inference is raised that Congress did not intend to include municipalities in with "States" for which the preemption exceptions are provided in the law. 664 F. Supp. at 1237. Even if this analysis were valid, municipalities are mentioned in FIFRA, at §22(b) [7 U.S.C. §136t(b)] where localities are fairly contemplated as adopting regulations, the uniformity of which is encouraged through voluntary cooperation.

For these reasons, the railroad cases are inapposite, distinguishable, and of no persuasive effect on the disposition of our case.

of petitioners declaring valid the Town of Casey Ordinance 85-1.

Dated this 26th day of February, 1991.

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### QUESTION PRESENTED

Is the ordinance enacted by the Town of Casey which regulates pesticide use independent of federal and state programs, Ordinance 85-1, preempted by or in conflict with the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y (1988).



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## In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1905

WISCONSIN PUBLIC INTERVENOR, AND  
TOWN OF CASEY, PETITIONERS,

v.

RALPH MORTIER AND  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF WISCONSIN

### BRIEF FOR THE RESPONDENTS

#### STATEMENT OF THE CASE

##### *The FIFRA Regulatory Scheme*

Pesticides have been regulated by the federal government since the Federal Insecticide Act of 1910, although a few states had regulated pesticides even prior to this time. H.R. Rep. No. 511, 92d Cong., 1st Sess. 9 (1971). In 1947, Congress replaced the Insecticide Act with the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), Pub. L. No. 80-104, 61 Stat. 163 (1947). FIFRA required pesticide registration and labeling, and was designed to work in harmony with a uniform insecticide, fungicide and rodenticide act developed for states by the



Council of State Governments. H.R. Rep. No. 511, *supra*, at 9-10.

After a series of minor amendments to FIFRA in 1959 and 1964,<sup>1</sup> Congress enacted a comprehensive set of amendments to FIFRA in 1972. Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (codified as amended at 7 U.S.C. 136, *et seq.*, (1988)). These amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ruckelshaus v. Monsanto*, 467 U.S. 986, 991 (1984).

As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration, and gave EPA greater enforcement authority.

*Id.* at 991-92. Since 1972, Congress has enacted additional amendments to strengthen federal reregistration authority, record and inspection authority and other areas.<sup>2</sup>

As presently enacted, FIFRA requires that all pesticides be registered with the U.S. Environmental Protection Agency ("EPA") and be classified according to general or restricted use. 7 U.S.C. § 136a. As part of this registration process, all pesticides must contain an approved label. *Id.*

<sup>1</sup> Nematocide, Plant Regulator, Defoliant and Desiccant Amendment of 1959, Pub. L. No. 86-139, 73 Stat. 286 (1959); Federal Insecticide, Fungicide and Rodenticide Act Amendment of 1964, Pub. L. No. 88-305, 78 Stat. 190.

<sup>2</sup> Insecticide, Fungicide and Rodenticide Act, Pub. L. No. 94-140, 89 Stat. 751 (1975); Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819; and Federal Insecticide, Fungicide and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654.

Among other things, the label expressly delineates the manner in which the pesticide may be used.<sup>3</sup>

To ensure pesticides will be properly applied in accordance with the label, FIFRA establishes a nationwide system for training and certifying pesticide applicators. 7 U.S.C. § 136b. It is unlawful to use a pesticide which is not registered, to alter a pesticide, to use a pesticide contrary to label instructions or to engage in other acts prohibited by FIFRA. 7 U.S.C. § 136j.

FIFRA also specifies several roles for states. States may impose additional regulations on the sale and use of pesticides to meet local needs. 7 U.S.C. § 136v(a). States which meet EPA standards may also certify pesticide applicators. 7 U.S.C. § 136b. States may also enter into cooperative agreements with EPA to enforce FIFRA provisions. 7 U.S.C. §§ 136u, 136w-1.

In conformity with FIFRA, the Wisconsin Legislature has enacted extensive provisions regulating pesticides. Wis. Stat. §§ 94.67-94.71 (1989-90). These provisions are enforced by the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP") which has promulgated administrative rules in Wis. Admin. Code chs. Ag 21, Ag 27, Ag 29, Ag 30, Ag 161 and Ag 163. Among other provisions, Wisconsin has imposed restrictions on the use of certain pesticides in certain counties of the state in response to local groundwater concerns. *See, e.g.*, Wis.

<sup>3</sup> Labeling requirements are set forth in 40 C.F.R. Part 156 (1990). Labels must contain the name of the product and producer, contents, registration number, producer number, ingredient statement, warnings, directions for use and use classification. 40 C.F.R. § 156.10(a). The directions for use include prescriptions for the sites of application, target pests for each site, dosage rates, methods of application, frequency and timing of applications, specific limitations on reentry and specific directions on storage and disposal. 40 C.F.R. § 156.10(i)(2).

Admin. Code § Ag 29.17 (restricting aldicarb use in the "central sands" area of Wisconsin) and Wis. Admin. Code ch. Ag 30 (effective 4/1/91) (restricting atrazine use). Wisconsin has not, however, delegated specific authority to local governments to administer, implement or enforce the state's pesticide program.

### *The Town of Casey Ordinance*

Casey is a rural town located in Washburn County in northwest Wisconsin with a population of 404 persons.<sup>4</sup> In 1983, the Town of Casey set out to develop a pesticide control ordinance. Several successive versions were enacted, culminating in Ordinance 85-1 which requires that a person obtain a local permit prior to applying pesticides to certain private or public lands. Section 1.2 provides:

1.2 Application of Pesticides. No person may apply any pesticide to public lands, or to private lands subject to public use (including, but not limited to Forest Croplands, as defined in Chapter 77, Stats.), or may aerially apply any pesticide to private lands within the Town of Casey except after obtaining a permit under section 1.3.

Town of Casey, Washburn County, Wisconsin, Ordinance 85-1 (1985) (II Pet. App. C at 6).<sup>5</sup> Section 1.3 requires that any person subject to the ordinance submit to the Town Board a detailed application with respect to any pesticide use at least 60 days prior to the proposed use (II Pet. App. C at 7).

<sup>4</sup> Data from 1980 Census reported in the Washburn County Directory 1982-83 (J. L. Brown, County Clerk).

<sup>5</sup> Appendix citations are to the Petitioner's Appendix since a separate joint Appendix was not filed.

The permit application under Section 1.3 must include the submittal of detailed technical information such as:

(d) an inventory of the pesticide(s) to be used listing the brand name, generic component ingredients, the quantities to be used, method of application, known benefits and known risks associated with the chemical(s) to be used;

(e) the chemical and non-chemical alternative methods or treatments available to accomplish the desired objectives and the reasons why the application of the proposed pesticide(s) is preferable to alternative chemicals and to other methods;

(f) the status of the proposed pesticide(s) and of any chemical alternatives in the federal Environmental Protection Agency's (EPA) pesticide reregistration program ...

(g) the positive and negative effect of reducing or eliminating the use of the proposed pesticide(s) and of any chemical alternatives;

(h) the anticipated impact of the application upon humans, animals and plants of the proposed pesticide(s) and of any chemical alternatives; ...

(II Pet. App. C at 8-9).

After an application is received, the Town Board has 15 days to make an initial determination on the application. Under Section 1.3(3), the Town Board retains absolute discretion to approve, condition or deny the request to use pesticides:

(3) Initial Determination by Town Board. ... The board may impose any reasonable conditions on a permitted application related to the protection of the health, safety and welfare of the residents of the Town of Casey. ...

(II Pet. App. C at 11-12). Restrictions on aerial spraying are specifically enumerated as a potential restriction. *Id.* The applicant or any town resident may request a hearing

before the Board on an application, but the Town Board still retains absolute discretion to approve, approve subject to conditions or deny the permit. Section 1.3(5) (II Pet. App. C at 12).

The ordinance also requires that a notice be posted after any pesticide use. Section 1.3(7) (II Pet. App. C at 14). Violators of the ordinance are subject to fines up to \$5,000 for each violation. Section 2 (II Pet. App. C. at 16).

### *Procedural Status*

Respondent Ralph Mortier owns 200 acres of forest land in the Town of Casey. Mortier sought to aerially apply herbicides on his property to control non-forest vegetation. Because these lands were zoned for forestry and were registered under Wisconsin's Forest Crop law, Mortier submitted an application to the Town Board for the use of herbicides.<sup>6</sup> On March 23, 1985, the Town Board granted Mortier a conditional approval which precluded any aerial spraying and restricted the lands on which ground spraying would be allowed. This decision was upheld by the Town Board on May 18, 1985.

Respondent Mortier, in conjunction with the Wisconsin Forestry/Rights-of-Way/Turf Coalition, brought a declaratory judgment action in June 26, 1986 challenging Ordinance 85-1.<sup>7</sup> The circuit court ruled in favor of Mortier on the grounds that the Ordinance was preempted by

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<sup>6</sup> Mortier's application was under Ordinance 83-1 (1983), a predecessor to Ordinance 85-1, which required a permit for pesticide use but did not contain a posting requirement.

<sup>7</sup> The coalition is an unincorporated nonprofit association of individual businesses and other associations whose members use pesticides. The Coalition includes farmers, Christmas tree growers and rural electric cooperatives, among others.

and in conflict with federal and state law (II Pet. App. B at 14).

The Wisconsin Supreme Court upheld the circuit court decision.<sup>8</sup> *Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990). The majority concluded that "the preemptive action of Congress deprived the Town of Casey of its police power to regulate pesticides." *Id.*, 154 Wis. 2d at 32, 452 N.W.2d at 561 (I Pet. App. A at 30). It reached this conclusion based on the statutory language of FIFRA and its legislative history. *Id.*, 154 Wis. 2d at 28-30, 452 N.W.2d at 559-60 (I Pet. App. A at 22-25).<sup>9</sup> Three justices dissented.<sup>10</sup>

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<sup>8</sup> The Wisconsin Supreme Court accepted a joint motion to bypass the Wisconsin Court of Appeals under Wis. Stat. § 809.60 (1987-88).

<sup>9</sup> Although the Court noted that FIFRA contained no express preemption language, it rejected the notion advanced by Petitioners that preemption requires an express statutory declaration. *Mortier*, 154 Wis. 2d at 24, 452 N.W.2d at 557 (I Pet. App. A at 14).

<sup>10</sup> Although the dissenting Justices took a different view of the statute and legislative history, their dissent appears in part to be based on the mistaken impression that, "the majority opinion apparently attempts to find express preemptive intent not in the text of the statute, but in the legislative history." *Mortier*, 154 Wis. 2d at 37 n.3, 452 N.W.2d at 563 (I Pet. App. A at 9) (Abrahamson, J., dissenting). The majority found *implied* preemption based on both the statutory text and legislative history. *Id.*, 154 Wis. 2d at 29-30, 452 N.W.2d at 560-561 (I Pet. App. A at 22-25).



## SUMMARY OF ARGUMENT

In enacting FIFRA, Congress established a coordinated and comprehensive federal-state scheme of pesticide regulation which preempts independent local pesticide regulation such as that enacted by the Town of Casey.

Congressional intent is the "ultimate touchstone" of preemption analysis. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1990). Here, Congressional intent to preempt the field of independent local regulation of pesticides is clearly revealed in the "structure and purpose" of FIFRA. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). Congress limited the authority to regulate pesticide use to "States," 7 U.S.C. § 136v(a), and defined "States" so as to exclude local governments. Section 136(aa). Moreover, the statutory structure of FIFRA demonstrates an intentional differentiation between regulatory authority delegated to "States" and non-regulatory authority which may be independently exercised by "States or political subdivisions thereof."

FIFRA's legislative history confirms that its "purpose" was to limit pesticide regulation to the federal and state scheme and preclude independent pesticide regulation by local governments. Attempts to authorize local regulation were rejected in both the House and the Senate when FIFRA was amended in 1972. Congress concluded, in the words of the Senate Agriculture and Forestry Committee, that "regulation by the federal government and the 50 states should be sufficient and *should preempt the field*." 1972 U.S. Code Cong. & Admin. News at 4026 (emphasis added).

The preempted field is, however, a limited one. Congress did not preclude states from delegating authority to local governments to administer and enforce a state pesticide program. Nor did Congress preempt local

government regulation in areas outside of pesticide regulation, such as groundwater protection, provided that the regulatory impact on pesticides is incidental. As such, the preempted field does not unduly interfere with either state or local authority.

In addition and apart from Congressional intent to preempt the field of independent local pesticide regulation, the Town of Casey ordinance conflicts with FIFRA by standing as "an obstacle to the accomplishment of the full purpose and objectives of Congress." *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984). The Casey ordinance is an independent regulatory scheme which is not coordinated with federal or state law in any respect. The permit scheme which it creates vests ultimate authority for pesticide use with the three-member Casey Town Board, and is contrary to the uniform and coordinated federal-state scheme contained in FIFRA.

A special feature of the federal-state scheme created by Congress is that it provides the necessary expertise and perspective for effective regulation while still allowing local needs to be met. The Casey ordinance thwarts this congressional purpose. It places the technical question of pesticide regulation into the hands of a town board which lacks the expertise, staff and financial resources to undertake this task. More importantly, it grants to the town board the discretion to exercise regulatory authority unconstrained by state or regional considerations. Thus, a local government could ban or restrict the use of a pesticide and in so doing allow pests such as the gypsy moth to spread to numerous neighboring jurisdictions. The result is greater threats to public health and welfare and the use of more pesticides over larger areas.

Finally, Congress foresaw that uncoordinated, independent local regulations would unduly burden interstate commerce and designed FIFRA to avoid that burden. Local

ordinances such as the Casey ordinance frustrate and defeat Congress' efforts. If ordinances such as Casey's were enacted by other local governments, substantial and undue burdens would be placed on persons who apply pesticides in multiple jurisdictions.

## ARGUMENT

### I. PREEMPTION OCCURS WHEN CONGRESS HAS OCCUPIED A LEGISLATIVE FIELD OR WHEN LOCAL REGULATION CONFLICTS WITH THE FEDERAL SCHEME.

The supremacy clause of the United States Constitution invalidates state or local laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

State or local law can be preempted in either of two general ways. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). "Field preemption" exists when "Congress evidences an intent to occupy a given field, [and] any state law falling within that field is preempted." *Id.* (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983)). Preemption of a given field may be either express or implied and is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990), (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).<sup>11</sup>

"Conflict preemption" occurs when state or local law conflicts with federal law. *Silkwood*, 464 U.S. at 248. Such a conflict arises when, "it is impossible to comply with both state and federal law" *Id.*, see also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); when the state law "stands as an obstacle to the

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<sup>11</sup> In addition to implying preemption from the statute's "structure and purpose," preemption can also be implied where "the scheme of federal regulation may be so pervasive" or "the federal interest is so dominant" that preemption is required. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

accomplishment of the full purposes and objectives of Congress" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); or when "local regulation ... would frustrate the federal scheme." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

For both field preemption and conflict preemption, "the question whether a certain ... action is preempted by federal law is one of Congressional intent. 'The purpose of Congress is the ultimate touchstone.'" *Allis-Chalmers v. Lueck*, 471 U.S. 202, 208 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. at 504 (conflict preemption); and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-96 (1983) (field preemption).<sup>12</sup>

When historic state powers are involved, this Court has applied "the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress" *California v. ARC Am. Corp.*, 109 S. Ct. 1661, 1665 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).<sup>13</sup> However, contrary to Petitioner's suggestion, this assumption is neither "stronger" nor "heavier" than the assumption applied in most preemption cases. Pet. Br. at 26-27. The "clear and manifest" standard is the standard this Court *usually* applies unless a state seeks to regulate in an area involving "uniquely federal interests."

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<sup>12</sup> For purposes of the supremacy clause, "the constitutionality of local ordinances is analyzed in the same ways as that of statewide laws." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13 (1985); see also *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

<sup>13</sup> Here, whether the assumption against preemption should apply at all is debatable since Congress has preempted local regulation, not state regulation. The federal-state scheme under FIFRA strengthens state powers *vis à vis* local governments.

Where there is a unique federal interest, the proof of Congressional intent to preempt need not be as strong as where a state seeks to regulate in areas traditionally left to the states. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988).

Moreover, contrary to the Solicitor's claim, the assumption against preemption is no stronger for health and safety regulations enacted under general police powers than regulations enacted under some other historic state power. See U.S. Br. at 7. For example, this Court has applied the same assumption to a state's historical powers to regulate generation of power, *California v. FERC*, 110 S. Ct. 2024 (1990); a state's power under the 21st Amendment to regulate the importation of liquor, *North Dakota v. United States*, 110 S. Ct. 1986 (1990); and state common law and statutory remedies against monopolies and unfair business practices; *California v. ARC Am. Corp.*, 109 S. Ct. 1661 (1989).

Apparently not satisfied with the existing preemption standards, Petitioners argue that only express statutory language can meet the "clear and manifest intent" test. Petitioners assert that, "the very idea in preemption law of 'implied intent that is clear and manifest' is itself oxymoronic and difficult to administer." Pet. Br. at 89 n.18.<sup>14</sup> Of course Petitioners' rule would cavalierly overturn over 50 years of precedent consistently recognizing that preemption may be implied as well as express. This Court has recently reaffirmed the importance of prior precedent. *California v. FERC*, 110 S. Ct. at 2029. Abandonment of implied preemption is simply not warranted.

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<sup>14</sup> See also Hawaii Br. at 4-5.



## II. THE TOWN OF CASEY ORDINANCE IS PREEMPTED BY FIFRA.

The language and the statutory structure of FIFRA, and its legislative history both clearly demonstrate that Congress intended to preempt independent local pesticide regulation such as the Casey ordinance. FIFRA creates a federal program which can be supplemented by state regulation to meet local needs. Independent regulation by local governments is incompatible with this regulatory scheme and is preempted. Congress hardly intended to create the "chaotic regulatory structure" that would flow from such regulation. *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

However, the preempted field is limited. States remain free to delegate authority to local units of government to administer and enforce a state pesticide program. Similarly, local units of government retain their traditional zoning and police powers in other fields, provided that the exercise of these powers have no more than an incidental regulatory effect on pesticides.

### A. Congressional Intent to Preempt Independent Local Regulation Is Demonstrated By the Language and Structure of FIFRA.

FIFRA creates a coordinated regulatory scheme in which federal regulation may be supplemented by state regulation. While states may delegate functions to local governments in carrying out the state program, Congress chose to preclude independent regulation by local governments.

The relevant section of FIFRA, 7 U.S.C. § 136v, provides that only a "State" may enact pesticide regulations in addition to federal regulations:

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but

only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter. [Emphasis added.]

The term "State" is specifically defined in FIFRA at 7 U.S.C. § 136(aa) and does not include political subdivisions:

The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

"As a rule, [a] definition which declares what a term 'means' ... excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)). FIFRA's definition of the term "State" thus excludes political subdivisions. Had Congress intended to include political subdivisions, it would have so stated as it has in other instances.<sup>15</sup>

Petitioners and the Solicitor attempt to avoid the statutory definition of "State" by claiming that local governments are necessarily included in the term "State." Pet. Br. at 36-37, U.S. Br. at 11. This argument might be persuasive but for the fact that Congress made a distinction throughout FIFRA between those authorities granted to "States" and those granted to "States and any political subdivision thereof." Regulatory authority was delegated to

<sup>15</sup> See e.g., 10 U.S.C. § 2232(1) (1988); 15 U.S.C. § 1693a(10) (1988); 15 U.S.C. § 1692a(8) (1988); 15 U.S.C. § 3316(b)(2)(C)(i) (1988); 18 U.S.C. § 1961(2) (1988); 25 U.S.C. § 1742(2) (1988); 25 U.S.C. § 1772a(2) (1988); 27 U.S.C. § 214(10) (1988); 29 U.S.C. § 1144(c)(2) (1988); 30 U.S.C. § 552 (1988); 42 U.S.C. § 4601(2) (1988); 42 U.S.C. § 8441(e)(4) (1988); 47 U.S.C. § 397(7)(A) (1988).

"States." Non-regulatory authority could be exercised by either states or their political subdivisions.

Congress gave "States" the authority to issue experimental use permits, § 136c(f); to certify pesticide applicators, § 136i(a)(2); to receive exemptions for emergency conditions, § 136p; to enter into cooperative grant-in-aid agreements with EPA for enforcement, training and administration, § 136u; and to exercise primary enforcement authority for pesticide use violations provided the state has adequate laws regulating pesticide use, § 136w-1(a).

By way of contrast, the authority given to "States or any political subdivision thereof" is very limited. "Political subdivisions" may inspect books and records, § 136f(b); cooperate in conducting monitoring activities, § 136r; and cooperate in "carrying out the provisions of this subchapter, and in securing uniformity of regulations," § 136t(b).<sup>16</sup>

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<sup>16</sup> Apart from the pattern of differentiation between the states and their political subdivisions, the sections which grant powers only to the State individually illustrate the preeminent role of states in the regulatory scheme. Only a "State" has the authority to register a pesticide for uses beyond those authorized in the EPA registration to meet "special local needs." 7 U.S.C. § 136v(c). Thus, Congress chose to address such local needs through states rather than local governments. If local governments could independently regulate to meet local needs, there would have been no need for Congress to authorize state control of local use. Only a "State" (and Indian tribes) may enter into cooperative grant-in-aid agreements with EPA for enforcement, training and administration, § 136u. Such agreements are not available to local governments. Finally, only a "State" may exercise primary enforcement for pesticide use violation, and then only if the program is deemed adequate by EPA, § 136w-1. Local governments were not given the option to enforce the provisions of FIFRA. See also *Coparr, Ltd. v. City of Boulder*, 735 F. Supp. 363, 367 (D. Colo. 1989), appeal docketed, No. 89-1341 (10th Cir.), appeal stayed (Jan. 15, 1991) (pending outcome of this case).

Petitioners' attempt to dismiss these statutory distinctions violates several principles of statutory construction. Pet. Br. at 36-40. If the term "political subdivision" is simply subsumed in the term "state," the statutory language in sections 136f(b), 136r and 136t(b) would be rendered surplusage. Such a construction should be rejected. Recently, this Court refused to construe the preemptive effect of ERISA in a manner which would have rendered statutory language superfluous. *Ingersoll-Rand, Co. v. McClendon*, 111 S. Ct. 478, 484 (1990); see also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 17 (1989).

Furthermore, where, "Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

This rationale was recently applied to different usages of the term "State" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 833, as amended, 29 U.S.C. § 1002, *et seq.* (1988). *Ingersoll*, 111 S. Ct. at 484. A limited definition of "State," comparable to the FIFRA definition, was contained in ERISA at 29 U.S.C. § 1002(10). An expanded definition of "State," set forth in another provision of the ERISA statute included "any political subdivisions thereof, or any agency or instrumentality of either." 29 U.S.C. § 1144(c)(2). This Court held that the two definitions of "State" had distinct meanings and explained that the broader definition was adopted to include "state agencies and instrumentalities whose actions might not otherwise be considered state law." *Ingersoll*, 111 S. Ct. at 484. The *Ingersoll* decision supports the argument that Congress meant what it said in



FIFRA when it defined "State" in a manner which excludes local governments.<sup>17</sup>

In addition to ignoring FIFRA's statutory differentiations, Petitioners argue that two sections indicate an intent to allow local regulation. First, Petitioners observe that § 136v(b) specifically preempts a "State" from imposing different "labeling or packaging" requirements. Petitioners argue that since the term "State" necessarily includes local governments in this context, the term "State" must also include local governments under § 136v(a). Pet. Br. at 30-31, 35-36. The fallacy of Petitioners' argument is that it ignores the substance of § 136v(a). Section 136v(a) provides that the regulation of pesticide use is limited to States. Section 136v(b) simply creates a further restriction by limiting certain state regulations. There is no need for § 136v(b) to specifically restrict labeling or packaging requirements by local governments because they have already been preempted under § 136v(a).

Second, Petitioners claim that local governments implicitly have authority to regulate pesticides given the language of § 136t(b) which allows the EPA administrator to "cooperate with ... any state or any political subdivision thereof in securing uniformity of regulations." Pet. Br. at 31-32. This argument is also misplaced. The language of

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<sup>17</sup> A similar analysis was applied in *Local 1564 v. City of Clovis*, 735 F. Supp. 999 (D.N.M. 1990) where the court concluded that the National Labor Relations Act of 1947, § 14(b), 61 Stat., 151 (codified as amended at 29 U.S.C. § 164(b) (1988)), only allowed "states" or territories, not local governments, to prohibit union security agreements. The court noted that, "in ordinary usage, the words 'State or territorial law' would not include legislation enacted by political subdivisions of the state," and "when Congress intended to cover subdivisions of the state, it did so directly." 735 F. Supp. at 1004.

authority to enact their own independent regulations. This provision helps assure that local governments have input into state regulations designed to meet local needs or general federal regulations. Coordination between local and state officials makes sense prior to state action registering a pesticide for a special local need under § 136v(b) or restricting pesticide to respond to local problems under § 136v(a). In addition, where states choose to utilize local governments in the administration and enforcement of a state pesticide program such coordination is particularly important.

#### **B. Congressional Intent to Preempt Local Regulation Is Demonstrated By the Purpose of FIFRA Expressed In the Legislative History.**

Although Respondents contend that the language and structure of FIFRA clearly preempts local regulation, it is nevertheless appropriate to review FIFRA's legislative history. This Court has observed that the "structure and purpose" of the statute should be examined in determining Congressional intent to preempt. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (emphasis added). Legislative history is relevant in determining the underlying purpose of the statutory language. See, e.g., *Ingersoll*, 111 S. Ct. at 485; *FMC Corp. v. Holliday*, 111 S. Ct. 403, 410-11 (1990); *City of New York v. FCC*, 486 U.S. 57 (1988); *Silkwood*, 464 U.S. at 249-56; *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 208-12 (1983).

Second, if there is any ambiguity in FIFRA, the Legislative history confirms the Congressional intent to preempt local regulation. *Mortier v. Town of Casey*, 154 Wis. 2d 18, 28, 452 N.W.2d 555, 559 (1990) (1 Pet. App. A at 21). A resort to legislative history which "give[s] meaning to an enacted statutory, text" is entirely



appropriate. *Puerto Rico Consumer Affairs Dep't v. Isla Petrol.*, 485 U.S. 495, 501 (1988).

**1. The Legislative History Demonstrates a Clear Intent to Preempt Local Regulation.**

Extensive Congressional study and debate preceded the 1972 FIFRA Amendments. One of the topics specifically debated was the allocation of responsibility for pesticide regulation between the federal, state and local governments. During this debate both houses of Congress rejected proposals which would have allowed independent local regulation and affirmed that the statutory scheme was intended to preempt local regulation.

(a) **The House rejects local regulation proposed by the Administration.** In February 1971, the Nixon Administration proposed amendments to FIFRA which were introduced in the U.S. House of Representatives as H.R. 4152. H.R. 4152, 92d Cong., 1st Sess. (1971) reprinted in *Hearings on Federal Environmental Pesticide Control Act of 1971, Before the House Committee on Agriculture*, 92d Cong., 1st Sess. 904 (1971). One section of the proposed bill would have allowed local regulation by providing that "nothing in this Act shall be construed as limiting the authority of a State or a political subdivision to regulate the sale or use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited under authority of this Act." *Id.* at § 19(c).

On September 25, 1971, the House Agriculture Committee reported a new bill, H.R. 10729, 92d Cong., 1st Sess. (1971), to the House of Representatives. This bill deleted any reference to local regulatory authority. The Committee Report accompanying the bill explained that this change was specifically intended to preclude local regulation:

The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions.

H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971). After two days of debate, the full House approved H.R. 10729 on November 9, 1971 by a vote of 288-91.<sup>18</sup>

(b) **Senate Agriculture and Forestry Committee rejects local regulation.** After H.R. 10729 was forwarded to the United States Senate, the bill was referred to the Senate Committee on Agriculture and Forestry for consideration. That Committee endorsed the decision of the House to restrict local regulation. The Committee Report, issued on June 7, 1972, stated:

The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the 50 States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities, whether towns, counties, villages or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis, and on the basis that permitting such regulation would be an extreme burden on interstate commerce, *it is the intent that Section 24, by not providing any authority to political subdivisions and*

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<sup>18</sup> See 117 Cong. Rec. 40,068 (1971). Even the Solicitor was forced to acknowledge that "the House Committee report may be read to provide some evidence of congressional opposition to local regulation of pesticides." U.S. Br. at 16-17.

*other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and regulation of pesticides.*

S. Rep. No. 838, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4008 (emphasis added).

(c) **Senate rejects local regulation proposed by the Senate Commerce Committee.** After the Committee on Agriculture and Forestry ordered H.R. 10729 reported to the full Senate, the bill was referred to the Senate Committee on Commerce. The Commerce Committee proposed a series of amendments to the bill, including an amendment which expressly authorized local regulation of the sale or use of pesticides. S. Rep. No. 92-970, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 1111.

The Senate Agriculture and Forestry Committee promptly filed a Supplemental Report on H.R. 10729 opposing the Commerce Committee's amendments. See 1972 U.S. Code Cong. & Admin. News at 4023. In rejecting the Commerce Committee amendment on local regulation, the Supplemental Report stated that, "regulation by the Federal government and the 50 States should be sufficient *and should preempt the field.*" *Id.* at 4026 (emphasis added).

After almost two months of meetings between the Agriculture and Forestry Committee and the Commerce Committee, a "Compromise Amendment in the Nature of a Substitute" was prepared. *Id.* at 4088. This compromise specifically rejected the Commerce Committee amendment on local regulation by noting that the Commerce Committee amendment was "not included in the substitute." *Id.* at 4091. The substitute bill was agreed to by a majority of the members of the Commerce Committee and by all of the members of the Agriculture and Forestry Committee. 118

Cong. Rec. 32,252 (statement of Sen. Allen) (Sept. 26, 1972).

On September 26, 1972, the full Senate proceeded to consider H.R. 10729. The original amendments proposed by the Commerce Committee were again offered, including the amendment authorizing local regulation of pesticides. See 118 Cong. Rec. 32,249-51 (Sept. 26, 1972). Senator Allen, the chair of the Agriculture and Forestry subcommittee which handled the bill requested the Commerce Committee amendments be withdrawn and the substitute bill be offered. *Id.* at 32,251-52. With the unanimous consent of the Senate, Senator Allen then inserted in the *Congressional Record* an excerpt from the Report of the Agriculture and Forestry Committee, which included the statement that the amendments "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." *Id.* at 32,256.<sup>19</sup> The Senate approved this version by a vote of 71-0. *Id.* at 32,263.

Subsequently, a Conference Committee was convened to resolve the differences between the Senate and House versions of FIFRA. No further discussion on local regulation arose since the House and Senate versions were consistent in limiting supplemental regulation to states. The House and the Senate both agreed to the conference report. 118 Cong. Rec. 35546 (October 12, 1972); 118 Cong. Rec. 33924 (October 5, 1972).

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<sup>19</sup> Senator Allen also introduced into the record excerpts from the Supplemental Report from the Agriculture and Forestry Committee explaining that the Commerce Committee amendment on local regulation was rejected. *Id.* at 32,257-60. (Senators Hart and Nelson who sponsored many of the Commerce Committee Amendments both expressed satisfaction with the final version notwithstanding the rejection of the local regulation amendment. *Id.* at 32,258-60.)



## 2. *Petitioners Mischaracterize the Legislative History.*

In the face of this remarkably clear legislative history, Petitioners and the Solicitor variously attempt to dismiss or confuse the legislative record. None of these mischaracterizations can, however, alter the expression of Congressional intent.

First, Petitioners argue that the Senate bill was a "compromise" in which, "the Senate Agriculture and Forestry Committee could not get preemption language into the law and the Senate Commerce Committee could not get specific authority language into the law." Pet. Br. at 56. That was not how the debate was framed. The Senate Agriculture and Forestry Committee adopted language by which it intended to "depriv[e]" local governments of jurisdiction over pesticide regulation. 1972 U.S. Code Cong. & Admin. News at 4008. The Agriculture and Forestry Committee never sought to "get preemption language into the law" (Pet. Br. at 56) nor was it necessary for them to do so.

The issue that was debated in the Senate was whether the preemptive intent in the Agriculture and Forestry Committee bill should be abrogated by the Senate Commerce Committee amendment. The resolution of this debate was not a compromise; the Commerce Committee amendment was defeated and the preemptive language approved by the Agriculture and Forestry Committee adopted. In rejecting the amendment, the Agriculture and Forestry Committee expressly stated that the law as written "should preempt the field." 1972 U.S. Code Cong. & Admin. News at 4026.

Moreover, the full Senate concurred in this resolution. The Commerce Committee amendments together with the Agriculture and Forestry Committee reports rejecting the

local authority amendment were read into the record by unanimous consent.<sup>20</sup>

Second, Petitioner argues that Committee reports should be disregarded unless the preemptive language appears in the final statute. Pet. Br. at 52-54. This argument again ignores the fact that Congress need not preempt by express language. See e.g., *City of New York v. FCC*, 486 U.S. 57, citing to *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986); *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). It also ignores the longstanding rule that Committee reports from the operative Congressional Committees are "the authoritative source for finding the Legislature's intent." *Garcia v. United States*, 469 U.S. 70, 76 (1984); see also *City of New York v. FCC*, 486 U.S. 57; *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980).

In a related argument, the Solicitor claims that the legislative history was ambiguous and should be disregarded because the desire to preempt "was by no means uniform among the bill's authoritative supporters." U.S. Br. at 21. Although Congress acts by majority vote and rarely speaks with uniformity, here the final Senate vote which did not include the Commerce Committee Amendment was 71-0. See discussion *supra* at p. 23.

Third, Petitioners argue that it is significant that the House and Senate Conference Committee did not address the local preemption issue. Pet. Br. at 56. Yet, there is no reason it should have. The House and Senate version of the relevant language was identical. In the absence of a dispute

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<sup>20</sup> This was not simply a floor speech by Senator Allen, but a presentation to the entire Senate of the key Committee debates and resolution of those debates. 118 Cong. Rec. 32,257-60 (October 12, 1972).



between Houses, there was no need to address the issue in the Conference Committee report.

Finally, the Petitioner argues that the legislative history should be disregarded because the reports refer to "authorization" of local regulation rather than "preemption." Pet. Br. at 48-49. However, the Senate Agriculture and Forestry Committee *did* speak to "depriving such local authorities ... [of] jurisdiction" and of "preempt[ing] the field." 1972 U.S. Code Cong. & Admin. News at 4008, 4026. Furthermore, the reports of the prevailing committees in both the House and Senate rejected an "authorization" of local authority because that was how the amendments were framed. The result in either case was to preempt local pesticide regulation.

The rejection of the President's proposed bill and the Senate Commerce Committee's proposed amendment, "reveals a conscious decision by Congress" to eliminate such language and should be respected. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978) (superseded by statute on other grounds, 1986); see also *Russello v. United States*, 464 U.S. at 23-24. On this record, the Wisconsin Supreme Court properly concluded:

[T]his legislative history could not be more clear. Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation. Principled decision-making and respect for the integrity of the legislative process compel the conclusion that Congress knew and meant what it was doing.

*Mortier*, 154 Wis. 2d at 31, 452 N.W.2d at 560-61 (I Pet. App. A at 27-28) quoting *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109, 113 (D.C. Md. 1986), *aff'd without opinion* 822 F.2d 55 (4th Cir. 1987). Accord: *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990) *petition for cert. filed*, No. 90-382.<sup>21</sup>

### C. The Weight of Authority Supports a Finding of Preemption.

This case cannot be resolved merely by counting prior opinions on one side of the issue or the other. Nevertheless, the weight of authority to date has favored preemption. In addition to the Wisconsin Supreme Court opinion in this case

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<sup>21</sup> Subsequent Legislative action confirms the Congressional intent to preempt. While, "expressions of a subsequent Congress generally are not thought particularly useful in ascertaining the intent of an earlier Congress," *Pacific Gas & Elec.*, 461 U.S. at 211 n.23; there are times when it may yet be instructive. *Id.* at 211-213; see also *Andrus*, 446 U.S. at 666-72 (1980); *Seatrail Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1960); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). Here, prior to enactment of the 1988 Amendments to FIFRA (Federal Insecticide, Fungicide and Rodenticide Act Amendment of 1988, Pub. L. No. 100-532, 102 Stat. 2654), the House held a full day of hearings on the specific issue of whether local governments should regulate pesticides. H.R. Rep. No. 13, 100th Cong., 1st Sess. 479-654 (1987). Despite several requests to add an amendment to specifically authorize local regulation, the House failed to do so. A subsequent Senate Bill, S. 1524, 100th Cong., 1st Sess. (1987), authorizing local regulation was similarly defeated. Thus, the 1988 Amendments reaffirm the basic federal-state regulatory scheme and reject independent local regulation.

and an early opinion from a New York appellate court,<sup>22</sup> the only two federal circuit court of appeals decisions on this issue have found preemption. See *Milford and Maryland Pest Control* discussed at pp. 26-27, *supra*.<sup>23</sup>

On the other side of this issue are the opinions of two other state courts, *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990) and *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984). In addition, the federal district court in *Coparr, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), *appeal docketed*, No. 89-1341 (Nov. 1, 1989, 10th Cir.) *appeal stayed* (Jan. 15, 1991) issued a decision concluding FIFRA preempted independent local enforcement of FIFRA, but did not preempt a local notification requirement.

The opinion of federal courts of appeals on questions of federal law should be entitled to greater deference than opinions of state courts or federal district courts. In addition, the decisions in *Central Maine* and *Coparr* both rely heavily on the faulty analysis of the 4-3 majority opinion of the California Supreme Court in *County of Mendocino*. The *County of Mendocino* decision was immediately overruled by the California legislature which

<sup>22</sup> *Mortier v. Town of Casey*, discussed at p. 7, *supra*; *Long Island Pest Control Assoc., Inc. v. Town of Huntington*, 72 Misc. 2d 1031, 341 N.Y.S.2d 93 (1973), *aff'd*, 43 App. Div. 2d 1020, 351 N.Y.S.2d 945 (1974).

<sup>23</sup> Furthermore, no fewer than five state attorneys general have issued formal opinions concluding that FIFRA preempts local regulation. 1989 Op. Atty. Gen. Ark. 89-212 (1989) (Arkansas); 1990 Op. Atty. Gen. Iowa 90-6-3 (1990) (Iowa); 1970-77 Op. Atty. Gen. La. 324 (1978) (Louisiana); 1988 Op. Atty. Gen. Md. 88-006 (1988) (Maryland); 70 Op. Atty. Gen. Md. 161 (1985) (Maryland); 41 Op. Atty. Gen. Ore. 21 (1980) (Oregon).

enacted a statewide program.<sup>24</sup> Moreover, the majority opinion ignored the statutory structure of FIFRA and utilized "specious" reasoning in dismissing FIFRA's legislative history. *County of Mendocino*, *supra*, 36 Cal. 3d at 499, 683 P.2d at 1165, 204 Cal. Rptr. at 912 (Kaus, J., dissenting).

Similarly, the opinion of the Environmental Protection Agency ("EPA") submitted in the Solicitor's brief is not entitled to deference. It is with some surprise that Respondents find EPA now endorsing local regulation because the only published position of EPA is to the contrary. In 1975, shortly after FIFRA was amended, EPA promulgated interpretive regulations for State plans to certify pesticide applicators. In its comments to 40 C.F.R. § 171.7(a) (1975), EPA agreed that FIFRA preempts independent local regulation.

**Section 171.7(a).** A State agency suggested that one word ("State") in this provision be changed to ("governmental") to allow for the inclusion of other cooperating agencies. This revision has been made to provide for the naming and describing of other agencies involved in certification programs.

This change is made only to accommodate a State needing the assistance of local authorities in implementing and maintaining its certification programs, and *provided that such assistance is uniform throughout the State and is totally responsive to State direction. It is not the intention of the Act or these regulations to authorize political subdivisions below the State level to further regulate pesticides.*

<sup>24</sup> See Cal. Food and Agric. Code § 11501.1 (West 1986). The enabling legislation, 1984 Cal. Stat. c. 1386 § 3, provided that, "It is the intent of the Legislature by this act to overturn the holding of *People ex rel. v. Deukmejian v. County of Mendocino* ..."



40 Fed. Reg. 11,700 (1975) (emphasis added). The amended language to which this EPA comment was directed was then codified in the Code of Federal Regulations, where it has remained unchanged to this day. See 40 C.F.R. § 171.7(a) (1988).<sup>25</sup>

Now in the context of this lawsuit EPA has reversed itself. The Solicitor first attempts to explain this reversal by asserting that FIFRA's regulation of pesticide applicators under § 136i(a)(2) is "fundamentally different" than regulation of pesticide use under § 136v(a). U.S. Br. at 22 n.20. Yet, the Solicitor does not articulate why local regulation of pesticide applicators is preempted while the broader authority to regulate pesticide use (which can also impact applicators) is not preempted. Failing to articulate a rationale for the asserted distinction, the Solicitor simply claims that EPA's earlier position "could have been more precise" and that in any event EPA has now changed its mind. *Id.*

While published policies and regulations of an agency may be entitled to deference, *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), such deference is not warranted where an agency's interpretation conflicts with the agency's earlier interpretation. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Here, EPA's new position has even less value because it has been announced in the context of this action. As this Court has noted, "courts may not accept appellate counsel's *post hoc* rationalization for agency [action]." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Motor Vehicle*

<sup>25</sup> This construction of FIFRA by EPA also is consistent with Respondent's construction of the "cooperation" language of § 136t(b). Coordination is helpful between the State and local authorities in "implementing and maintaining its certification programs." *Id.*

*Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).<sup>26</sup>

#### **D. The Preempted Field Does Not Unduly Restrict State or Local Authority.**

Petitioners and various *amici* argue that preemption of local pesticide regulation unduly restricts both state and local authority. This argument is based on a mischaracterization of the preempted field. Petitioners incorrectly assume that the preempted field precludes any role for local governments. The preempted field is limited to the enactment of independent regulation of pesticides by local government. The preempted field does not preclude the states from delegating authority to local governments to administer and enforce the state's program. Nor does it preclude local governments from regulating in areas outside of the preempted field such as groundwater protection regulations.

##### **1. The Preempted Field Does Not Unduly Restrict a State's Authority to Delegate Functions to Local Governments.**

Petitioners' "Tenth Amendment" argument is based on two incorrect assumptions: (1) that the preempted field would preclude the states from delegating any functions to local governments, and (2) that it is impermissible for Congress to place *any* restriction on a state's ability to delegate functions to its local governments.

<sup>26</sup> This lack of deference is also consistent with the general proposition that an agency's construction of statute soon after enactment is entitled to more weight than a construction developed years after the fact. *Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983); See also *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933).



First, FIFRA does not preclude all delegation to local governments. The field preempted by FIFRA still allows a state to delegate authority to local governments to administer and enforce a *state* program. The primary restriction is that the program must be a *state* program. It is the operation of an independent local program operating under its general police powers unsupervised by the state that the Wisconsin Supreme Court preempted. *Mortier*, 154 Wis. 2d at 32, 452 N.W.2d at 561 (I Pet. App. A at 28-30). A state can, however, specifically delegate a wide variety of functions to local government including administration, education, training, monitoring and enforcement.<sup>27</sup>

California, the nation's largest agricultural state, provides a useful example. Under California's framework, the County Agricultural Commissioner is utilized to administer a comprehensive state program. Among other things, the Commissioner may issue local pesticide use permits subject to state standards and state review. Cal. Food & Agric. Code, §§ 14006.5, 14009 (West 1986).<sup>28</sup>

Thus, the existing federal-state scheme allows states to utilize local knowledge in the implementation of a state

<sup>27</sup> Thus, to a large extent, a state can choose to assign duties "to counties to carry out state policies, standards or programs" as the Petitioner urges. Pet. Br. at 95.

<sup>28</sup> Although the County Commissioner may propose additional regulations for his or her county, Cal. Food & Agric. Code, § 11503 (West 1986), such regulations remain state regulations because they are only effective after express approval of the State. State review and approval determines the "necessity, authority, clarity and consistency of the regulation." *Id.* Such a program is also consistent with the fact that a state can enact regulations that apply to portions of the state rather than statewide. See Wis. Admin. Code § Ag 29.17 (restricting the use of aldicarb to certain counties in Wisconsin) and Wis. Admin. Code ch. Ag 30 (eff. April 1, 1991) restricting the use of atrazine in certain local "management areas."

program.<sup>29</sup> It merely prohibits independent local regulation operating outside of that scheme.

Just as the Petitioner overstates the preemptive scope of FIFRA, so too the Petitioner overstates the restrictions imposed by the Tenth Amendment. The Tenth Amendment does not preclude Congress from preempting certain local regulations. This Court has observed that, "for purposes of the supremacy clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985). See also *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

Moreover, Congress' authority to preempt any regulation in a given field includes the more limited authority to preempt certain local regulation in that field.<sup>30</sup> Even the Solicitor admits that Congress could have preempted all pesticide regulation:

In contrast to cases such as *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), there is no contention here that Congress is not constitutionally empowered to prohibit all state and local regulation of the particular subject matter involved in this litigation.

<sup>29</sup> Cf. Conservation Law Fd. Br. at 30-32.

<sup>30</sup> See *FERC v. Mississippi*, 456 U.S. 742, 765 (1982) where the Court noted:

... Congress could have preempted the field ... ; PURPA should not be invalid simply because out of deference to state authority, Congress adopted a less intrusive scheme and allowed the states to continue regulating in the area on the condition that they consider the suggested federal standards.

U.S. Br. at 23 n.21.<sup>31</sup> Thus, even if this Court is interested in reexamining *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), this is not the case to do so.

Finally, there are several areas where Congress has allowed for state regulation but has precluded or restricted local regulation. For example, the Federal Railroad Safety Act of 1970, § 205, Pub. L. No. 91-458, 84 Stat. 972 (codified as amended at 45 U.S.C. § 434 (1988)) provides for national safety standards, but allows states to adopt additional regulations. Under this scheme, local governments are precluded from enacting independent regulations. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973).<sup>32</sup> Similarly, the National Labor Relations Act of 1947, § 14(b), 61 Stat. 151 (codified as amended at 29 U.S.C. § 164(b) (1988)), allows state regulation of union security agreements, but preempts local regulation because "a myriad of local regulations would create obstacles to Congress' objectives under the NLRA." *Local 1564 v. City of Clovis*, 735 F. Supp. 999, 1002 (D.N.M. 1990). Even the Solicitor notes numerous examples of where the federal government conditions grant moneys on a state having a state-wide plan. U.S. Br. at 24 n.21. Thus, the restrictions on independent local pesticide regulations under FIFRA are neither unique nor improper.

<sup>31</sup> Cf. *Hawaii Br.* at 16-18.

<sup>32</sup> Contrary to the Petitioners' assertion, the rail cases are not "completely different." *Pet. Br.* at 99 n.34. As set forth in Section III, *infra*, like the rail cases, FIFRA has, as a special feature, a coordinated federal-state scheme which precludes independent local regulation.

## 2. *The Preempted Field Does Not Unduly Restrict Local Zoning Authority or Interfere With the Safe Drinking Water Act.*

Preemption of one field by an act of Congress does not preclude a state or local government from acting in another field, provided that there are only incidental impacts on the preempted field. For example, in *Pacific Gas & Elec.*, *supra* at p. 19, this Court held that "the federal government has occupied the field of nuclear safety concerns." 461 U.S. at 212. However, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court held that a state may award damages based on its own tort law for those injured by nuclear incidents, notwithstanding the fact that such awards may have some regulatory impact. *Id.* at 256. Similarly, in *North Dakota v. U.S.*, 110 S. Ct. 1986 (1990), this Court held that a federal procurement law did not preempt state laws which "incidentally raise[d] the costs to the military." *Id.* at 1998.

Here, the field preempted by Congress is the independent regulation of pesticides by local government. Local units of government retain their traditional powers in other fields. There may be a variety of actions by local governments in these other fields which would not be preempted if their impact on pesticide regulation was incidental.<sup>33</sup>

<sup>33</sup> In this regard, Respondents agree with amici Village of Milford, et al. *Br.* at 25-28. Respondents disagree, however, as to the full range of ordinances which have an incidental impact. Clearly, in *Milford*, discussed at pp. 26-27, *supra*, the Sixth Circuit found notice and posting ordinances to be regulatory ordinances with more than an incidental impact on pesticide use. Here, however, there is no dispute that the Casey ordinance has more than an "incidental impact." Amici for the Village of Milford note, "The concern [prompting Congressional (continued...)]



For example, a basic local zoning decision that changes a parcel from an agricultural zone to a commercial zone may impact the amount and type of pesticides used on the property. Such an impact, however, is clearly incidental and not preempted.

Similarly, a local decision taken in accordance with the wellhead protection program of the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642 (codified as 42 U.S.C. § 300, *et seq.* (1988)), could preclude the use of a variety of inorganic and organic chemicals in a defined area to protect a wellhead area. If pesticides are among the restricted chemicals, there may be an incidental regulatory impact on pesticides, but the program itself operates outside of the preempted field.

Moreover, like FIFRA, the wellhead protection program is primarily designed to operate through "States." 42 U.S.C. § 300h-7 (1988) creates "State programs to establish wellhead protection areas" to be approved by EPA. The state program must "specify the duties of ... local government entities," § 300h-7(a)(1), but the program remains a state program under direct state control. Thus, this program can remain coordinated with state pesticide regulations.

#### **E. The Town of Casey Ordinance Falls Within the Preempted Field.**

The Town of Casey ordinance clearly falls within the preempted field. The ordinance is not part of a state

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<sup>33</sup> (...continued)

discussion of preemption] applies only to the very few local regulations that require complex scientific determinations such as the banning or restricting the use of a pesticide." *Village of Milford Br.* at 28. The Casey ordinance is such an ordinance.

pesticide program. It is instead an independent regulatory scheme enacted under the Town's general police powers.

There is no dispute that the Town of Casey ordinance stands as a wholly separate and independent regulatory scheme from the state program. The ordinance requires a permit prior to any pesticide use apart from the federal and state programs. The permit application process, the criteria for permit issuance and the ultimate decision by the Town Board all are independent of the federal and state programs to register pesticides and license pesticide applicators.

Indeed, Petitioners promote the independence of this program. They claim that because federal and state programs are "incomplete," the Town of Casey should be entitled to act on its own to fill in "gaps that neither federal nor state laws address." *Pet. Br.* at 69. It is precisely this type of independent regulation that Congress intended to preempt by limiting regulation to states.<sup>34</sup>

### **III. THE TOWN OF CASEY ORDINANCE CONFLICTS WITH FIFRA.**

Even where Congress has not preempted an entire field, state and local laws are preempted to the extent that they conflict with federal law. Such a conflict can arise when "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v.*

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<sup>34</sup> Significantly, *Hawaii, et al.* acknowledge that, "there is good reason for FIFRA not to directly authorize local governments to regulate, for doing so could mean that local governments would be able to regulate even if the State did not want them to ..." *Hawaii Br.* at 6. Yet, absent an affirmative preemptive action by a state, *Hawaii's* construction of FIFRA would indeed allow a local government to regulate even if a state did not want them to. As noted in Section III, *infra*, an ordinance like the Casey ordinance could, for example, directly interfere with Wisconsin's efforts to control such pests as the gypsy moth.



*Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), or when "local regulation ... would frustrate the federal scheme." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

An assessment of whether a conflict exists necessarily requires a comparison of the "purposes and objectives" of the federal law with the state or local law at issue. See, e.g., *California v. ARC America Corp.*, 109 S. Ct. 1661, 1665-68 (1989); *Transcontinental Pipeline v. Oil & Gas Board*, 474 U.S. 409 (1986); *Silkwood*, *supra*, 464 U.S. at 257.

As in a field preemption type challenge, ascertaining the purposes and objectives of Congress in a conflict analysis requires a review of the express language used by Congress in the statute, together with a review of its structure and purpose, including legislative history. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).<sup>35</sup> A review of FIFRA and its legislative history reveal three interrelated purposes and objectives of FIFRA. The Town of Casey ordinance stands as an obstacle to and frustrates the accomplishment of each of those objectives.

#### A. The Casey Ordinance Stands As an Obstacle to the Goal of Coordinated Pesticide Regulation.

The statutory scheme of FIFRA emphasizes the need for a coordinated national program. As set forth above, the primary vehicle to assure coordination was the limitation of regulatory authority to the federal government and states.

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<sup>35</sup> See also *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990); *California v. FERC*, 110 S. Ct. 2024 (1990); *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493 (1989); *Transcontinental Gas Pipeline, supra*, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

Independent and uncoordinated regulation by local governments would defeat that scheme. In addition, to assure a coordinated national program, Congress also enacted § 136t(b) to assure that EPA would work with states and their political subdivisions in "securing uniformity of regulations."

The legislative history of FIFRA also emphasizes the Congressional intent to have coordinated pesticide regulation. When the House Committee on Agriculture issued its report on H.R. 10729, it began by highlighting the need for a coordinated federal state system.

In so changing old FIFRA, the new statute would contain the following main provisions:

1. It establishes a coordinated federal-state administrative system to carry out the new program. The states are given prime responsibility for the certification and supervision of pesticide applicators. The federal government sets the program standards the states must meet. State authority to change federal labeling and packaging is completely preempted, and state authority to further regulate "general use" pesticides is partially preempted.

H.R. Rep. No. 511, 92 Cong., 1st Sess. 1-2 (1971) (emphasis added).<sup>36</sup>

The Town of Casey ordinance interferes with the type of coordinated federal-state program envisioned by Congress. As noted above, the Town of Casey ordinance is a wholly independent regulatory scheme which is not coordinated in any respect with either federal or state law. To allow the Town of Casey ordinance to stand, and to invite the 83,200

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<sup>36</sup> See also 117 Cong. Rec. 40,067 (1971) (remarks of Rep. Mizell, Nov. 9) (FIFRA establishes a "coordinated Federal-State administration system to control the application of pesticides.").

local units of government<sup>37</sup> throughout the country to also enact their own unique and independent set of pesticide regulations would not only frustrate Congress' goal of coordination, it would render that goal an impossibility.<sup>38</sup> As the 6th Circuit noted in *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 934 (6th Cir. 1990):

[A]doption of the *Mendocino County* view would allow the uniformity and comprehensiveness Congress sought to establish through FIFRA to be lost in the muddle of thousands of local standards and regulations. FIFRA would no longer stand as a sweeping federal regulatory framework but would become the lowest common denominator in an equation of infinite variables.

#### **B. The Casey Ordinance Stands As an Obstacle to the Effective Regulation and Use of Pesticides.**

In enacting FIFRA, Congress recognized the value of pesticides along with the need to create a regulatory structure which could protect the public health, welfare and environment from the improper use of pesticides. The House Agriculture Committee noted:

The Committee acknowledges that the wise use of pesticides has saved millions of lives by controlling insect vectors of diseases such as malaria and typhus, and the Nation as a whole has benefitted tremendously from the efficiency of insect and weed control made

<sup>37</sup> United States Department of Commerce, Statistical Abstract of the United States, 1990 at 271-72 (11th ed.).

<sup>38</sup> *Accord: Local 1564 v. City of Clovis*, 735 F. Supp. 999, 1002-1003 (D.N.M. 1990) ("[T]he diversity that arises from different regulations among various of the 50 states and the federal enclaves ... is qualitatively different from the diversity that would arise if cities, counties and other local government entities throughout the country were free to enact their own regulations).

possible by agricultural applications of pesticides of various sorts.

But on the other hand, there is evidence of diminished effectiveness of control and increased undesirable effects on non-target and beneficial organisms resulting from indiscriminate use and abuse of invaluable pesticides.

H.R. Rep. No. 511, 92d Cong., 1st Sess. 4 (1971); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 990-992.

A special feature of the federal-state regulatory scheme created by Congress is that it provides the necessary expertise and regional perspective for effective regulation while still allowing local needs to be met. The Casey ordinance thwarts this Congressional purpose in two critical respects.

#### **1. The Casey Ordinance Creates Regulatory Authority Without Regard For Expertise.**

Congress provided regulatory authority to those agencies with the necessary technical expertise to ensure effective regulation. The 1972 Amendments to FIFRA transferred control of pesticide regulation from the U.S. Department of Agriculture to the EPA. The 1988 Amendments attempted to bolster EPA's program by providing additional authority to reregister pesticides as well as additional resources through the imposition of registration and maintenance fees. H.R. Rep. No. 939, 100th Cong., 2d Sess. 29, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3478.

Moreover, Congress also recognized that states may have the expertise to allow them to adapt regulations to meet local needs. States may permit the use of a registered pesticide for a special local need which was not originally contemplated when the pesticide was registered by EPA under § 136v(c). States may also impose stricter pesticide



restrictions to account for sensitive local conditions under § 136v(a).<sup>39</sup>

Congress anticipated that many local units of government simply do not have "the financial wherewithal [to] provide necessary expert regulation comparable with that provided by the state and federal governments." 1972 U.S. Code Cong. & Admin. News at 4008. Certainly, that is a legitimate concern where small rural town boards are asked to independently review applications for pesticide use without the benefit of the staff or resources to do so.

## 2. *The Casey Ordinance Creates Regulatory Authority Without Regard for State or Regional Interests.*

Apart from the issue of local expertise, there looms an even more significant concern. Local units of government are by definition limited jurisdictions and have a focus that is confined to local needs. While this local perspective can in some instances be helpful, in other cases, it can result in parochialized decision-making.<sup>40</sup> Here, a parochial view can easily result in the "not-in-my-back-yard" syndrome which is especially problematic in pesticide regulation. Restrictions on pesticides by one jurisdiction could allow a pest, which could have been easily controlled through a limited pesticide application, to spread to neighboring jurisdictions. At that point, control of the pest could well mean the use of additional pesticides over much larger areas. Thus, a parochial view of pesticide regulation can not only

<sup>39</sup> Wis. Admin. Code § Ag 29.17 and ch. Ag 30, discussed *supra* at 3-4.

<sup>40</sup> Clearly, there are times when parochial local government interests must give way to broader national concerns. See *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

shift the use of pesticides to "somebody else's backyard," but in so doing exacerbate the problem that must be addressed.<sup>41</sup>

The potential impact of such a parochial view can be demonstrated by three well publicized recent pest problems. One well documented problem is the gypsy moth infestation. As a result of the spread of this pest, the U.S. Department of Agriculture has established domestic quarantine areas where there has been gypsy moth infestation. See 7 C.F.R. § 301.45(a) (1990). The gypsy moth is a "dangerous insect injurious to forests and shade trees." *Id.* A portion of the "Gypsy Moth ... Program Manual" is appended to these regulations. This manual notes that, "proper timing of [pesticide] application is essential and is difficult to maintain in a large program." 7 C.F.R. § 301.45, App. IV.D.2. Generally, eradication programs require two applications 7-14 days apart where larvae are active and may require aerial applications. *Id.* A Casey type ordinance, with a 60 day permit application requirement and limits on aerial spraying could preclude effective treatment of the gypsy moth.

In the California area, the mediterranean fruit fly or medfly threatened to destroy large portions of California's multi-million fruit and produce industry. See 7 C.F.R. § 301.78 (1990) for quarantine areas. If local units of government could restrict pesticides necessary to control the

<sup>41</sup> Thus, the regulation of pesticides stands on different footing than other environmental statutes. Cf. Conservation Law Fd. Br. at 15-30. More restrictive local regulations for air, water, solid and hazardous wastes may force a source to move from one area to another, but such relocations do not have the potential to exacerbate the potential environmental or public health and welfare impacts.



medfly, the problem could spread.<sup>42</sup> Perhaps an even more critical problem was presented by the encephalitis outbreak in Florida borne by mosquitos. Again, untreated areas could have served as refuges for the infected mosquitos.

On a less dramatic, but more pervasive scale, independent local regulations could jeopardize efforts to limit pesticides through integrated pest management (IPM).<sup>43</sup> IPM is a concept which integrates a variety of tactics for the control of pests including improved cultivation practices, use of pest resistant crops, biological controls and sophisticated pesticide application.<sup>44</sup> Under IPM, pesticides are not routinely applied in anticipation of pests. Instead, crops are carefully monitored and pesticides are used in a carefully timed and focused manner only where a specific pest problem has been identified.<sup>45</sup> Even the

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<sup>42</sup> See, J. Carey, *Demography and Population Dynamics of the Mediterranean Fruit Fly*, 16 *Ecol. Model.* 125 (1982) ("[T]he probability of a medfly population becoming established from only a few founding individuals appears to be quite high."). *Id.* at 125.

<sup>43</sup> The value of IPM is reflected in the fact that FIFRA expressly provides that instructional materials concerning integrated pest management techniques must be made available upon request to individuals seeking certification as pesticide applicators. 7 U.S.C. § 136i(c).

<sup>44</sup> See *Alternative Agriculture*, National Research Council Board on Agriculture, National Academy Press (1989), p. 176; M. Barrett and W. Witt, *Maximizing Pesticide Use Efficiency, Energy in World Agriculture: Energy in Plant Nutrition and Pest Control*, Elsevier (1987), pp. 234-35.

<sup>45</sup> See, e.g., D. Gadoury, Wm. MacHardy, D. Rosenberger, *Integration of Pesticide Application Schedules for Disease and Insect Control in Apple Orchards of the Northeastern United States*, 73 *Plant Disease* 98 (Feb., 1989), pp. 176-77; R. Doersch, et al., *Management Principles for the Wisconsin Farmer*, UW Extension (1988), pp. 11-13.

Petitioner has claimed that "Integrated Pest Management (IPM) is an indispensable component of any effort to help farmers and other pest managers control pests, while reducing pesticide contamination of our waters."<sup>46</sup>

Yet, IPM becomes unworkable under ordinances such as the Casey ordinance. Casey's requirement that a permit application be submitted 60 days prior to pesticide use effectively precludes the use of pesticides on short notice in response to a specific pest. Under the Casey ordinance, pesticides must be applied in anticipation of pests rather than in response to pests.

The problem of parochial pesticide regulations was avoided when Congress created a federal-state scheme which subordinates such parochial interests to federal and state control. Congress clearly viewed "the 50 states and federal government [as] provid[ing] sufficient of jurisdictions to properly regulate pesticides." 1972 U.S. Code Cong. & Admin. News at 4008. Disruption of this structure could have dire consequences for the protection of public health, welfare and the environment.<sup>47</sup> In short, ordinances like

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<sup>46</sup> See, R. 6, Motion of State of Wisconsin Public Intervenor to Intervene, Ex. A: T. Dawson, *Overview of Ground and Surface Water Contamination by Pesticides*, presented at National Governors' Association Committee on Energy and Environment State Integrated Toxics Management Conference, San Diego, California, September 20, 1984, p. 17.

<sup>47</sup> It is perhaps not surprising that most courts which have reviewed the question of whether local ordinances are preempted by a State pesticide program have found local ordinances to be preempted. *Ames v. Smoot*, 98 A.D.2d 216, 471 N.Y.S.2d 128 (1983); *Long Island Pest Control Association, Inc. v. Town of Huntington*, 72 Misc. 2d 1031, 341 N.Y.S.2d (1973), *aff'd* 43 A.D.2d 1020, 351 N.Y.S.2d 945 (1974); *Pesticide Public Policy Foundation v. Village of Wauconda*, 622 F. Supp. 423 (N.D. Ill. 1985) *aff'd* 826 F.2d 1068 (7th Cir. 1987); *Town* (continued...)

Casey's not only conflict with FIFRA, they simply are not "good government."

**C. The Casey Ordinance Stands As an Obstacle to the Goal of Avoiding an Undue Burden on Interstate Commerce.**

As with many legislative decisions, FIFRA reflects a balance of competing public policy interests. FIFRA was designed to provide for a more effective means of regulating pesticide use while acknowledging that pesticides continue to serve useful and necessary functions in society.

The decision to preclude independent local regulations was based in part on the concern that further regulations would unduly impact interstate commerce. As the Senate Agriculture and Forestry Committee noted:

On this basis and on the basis that *permitting such regulation would be an extreme burden on interstate commerce*, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the states, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.

S. Rep. No. 838, 92d Cong., 2nd Sess., *reprinted in* 1972; U.S. Code Cong. & Admin. News at 4008 (emphasis added).

The Town of Casey ordinance also stands as an obstacle to this goal of FIFRA. By allowing local regulation of pesticides, the balance has been altered in a way that

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<sup>47</sup> (...continued)

of *Wendell v. Attorney General*, 394 Mass. 518, 476 N.E.2d 585 (1985); *Town of Salisbury v. New England Power Co.*, 121 N.H. 983, 437 A.2d 281 (1981).

dramatically increases the burdens on interstate commerce.

Although this case is not before the court on a commerce clause claim, the basic parameters of the ordinance demonstrate a number of ways in which it serves to potentially burden interstate commerce. As noted above, the Casey ordinance could increase crop loss by enabling an insect or fungus to rapidly spread into other jurisdictions in the intervening time.

In addition to crop loss, there is the burden of administrative costs. The administrative costs for completing a single permit application, attending a public hearing and seeking an appeal is probably not burdensome in and of itself. But a regulatory scheme which allows each jurisdiction to impose its own conflicting type of pesticide use regulations could quickly impose substantial administrative costs.

Among the members of the coalition which joined respondent Mortier in challenging the Casey ordinance are companies which must maintain rights of way over long distances throughout northern Wisconsin. If in maintaining a utility or railroad right-of-way it would be necessary to apply for a different permit for each jurisdiction its right-of-way passed through, it could well impose substantial burdens on interstate commerce.

As noted above, it is not the purpose of this brief to make this a commerce clause case. However, it is precisely this type of question which Congress sought to avoid by establishing a federal-state scheme of regulation which did not allow for independent local regulation of pesticides.<sup>48</sup>

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<sup>48</sup> Significantly, the House Agriculture Committee rejected the type of permitting program enacted by the Town of Casey precisely because of its burden on interstate commerce:

(continued...)

The Town of Casey ordinance and other ordinances like it therefore stand as an obstacle to a third major goal of FIFRA.

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48 (...continued)

H.R. 4152, the Administration's legislative proposal requested authority to designate a pesticide in one of three classifications namely "for general use," "for restricted use", "for restricted use", or "for use by permit only". *Pesticides designated for "use by permit only" would have required "approval in writing for the amount and type of article for each particular application" of an "approved pest management consultant" licensed by a State. The Committee gave this proposal of a third classification and requirement for pest management consultant very careful consideration. The Committee found this proposal would place on the Administrator and users an unworkable and costly burden far in excess of need or benefits gained by such regulatory machinery.*

H.R. Rep. No. 511, 92d Cong., 1st Sess. 15 (1971) (emphasis added).

## CONCLUSION

Because the Town of Casey ordinance is preempted by or in conflict with FIFRA, the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WISCONSIN PUBLIC INTERVENOR, and  
TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER and  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION,

Respondents.

ON WRIT OF CERTIORARI TO THE  
WISCONSIN SUPREME COURT

REPLY BRIEF OF PETITIONERS

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## STATEMENT OF THE CASE

Petitioners stand by the statement of the case in their brief on the merits, and adopt by reference the statement by the United States to the extent that it supplements Petitioners' statement.

The cited statutes, rules, and the Town of Casey ordinance cited in Respondents' Brief speak for themselves.

We disagree with the characterization that the Casey Town Board "retains absolute discretion" to approve, condition or deny applications under the ordinance. R. Br. at 5, 6. The Board is bound to exercise legal and sound discretion in the application of the ordinance, and does not claim absolute, arbitrary or unlimited discretion to act outside of the law.

With respect to the conditional approval issued to Mr. Mortier, R. Br. at 6, Mr. Mortier was granted a permit subject to the condition that he not aerially apply pesticides, and that he

apply pesticides within limited areas of his land. I Pet. App. 5-6.

#### ARGUMENT

#### I. THE CLEAR AND MANIFEST PURPOSE TEST IN PREEMPTION CASES SHOULD BE STRENGTHENED AND CLARIFIED, NOT ERODED.

Petitioners reaffirm our request to the Court to clarify the law of preemption for future guidance to the Congress and the courts. See Pet. Br. at 87-89.

A holding of preemption based on ordinary rules of statutory interpretation and mere inferences from reports of committees that do not speak for the entire Congress would only erode the clear and manifest purpose test to which this Court has so long intended to guide the courts of this nation.

If deference is to be truly and consistently given by the courts to the historic police powers of the states and their local governments, Florida Lime and

Avocado Growers v. Paul, 373 U.S. 132, 146 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), Jones v. Rath Packing Co., 430 U.S. 519 (1977), Penn Dairies v. Milk Control Comm'n, 381 U.S. 261, 275 (1943), then the "clear and manifest purpose" test of preemption should discourage, not just be a tool to resolve, continuing lawsuits that are based on mere arguable inferences of congressional intent arising from ordinary rules of statutory construction.

Throughout their briefs, Respondents and their amici (hereafter Respondents et al.) cleverly employ the technique of selectively invoking "ordinary rules of statutory construction"<sup>1</sup> to raise non-dispositive inferences of congressional intent not to authorize local regulation of pesticides. The intent of

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<sup>1</sup>E.g., R. Br. at 15, 17-19, 25, 27 n.21, 30; Cal Br. at 18 n.6.

congressional committees and individual legislators are repeatedly characterized as, and elevated to the status of, the intent of a full "Congress." R. Br. at 20-27. Inferences are totalled up to make the case of "clear preemption." Quantitative analysis has displaced a qualitative one.

Respondents et al. have assiduously avoided testing their inferences of intent against the first rule of statutory interpretation in preemption cases. That is, intent to preempt must be "clear and manifest," Rice v. Santa Fe Elevator Corp., 331 U.S. at 230, "unambiguous," and "unmistakably . . . ordained." Florida Lime and Avocado Growers v. Paul, 373 U.S. at 147. Mere inferences of congressional intent, such as those ordinarily drawn from committee reports, the fiction that all voting members know of and concur with them, and even subsequent legislative

action continue to be raised in support of an accumulative, rather than qualitative, argument of intent by Congress to preempt.

This preemption challenge succeeded in several lower courts despite the fact that Respondents and like parties cannot refute the fact that the Conference Committee and the full Congress, when they voted on FIFRA (Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136 (1988) et seq.), voted to preempt only regulation of pesticide labels and packaging, and did not vote to preempt local regulation of pesticides.

Despite reaffirmation of the "clear and manifest" purpose rule by this Court, congressional committees and members of Congress, unable to achieve or unwilling to risk failing to obtain, clear preemption language in the laws they shepherd, can in their place skillfully plant inferences of implied preemptive



intent to increase the chance the courts will legislate what they could not. Lawyers characterize the statutes and legislative histories to raise still more inferences. The issue is no longer whether preemptive intent is clear in the law. It is whether inferences outside the law against preemption can be made more numerous than those for. Instead of the heavy burden this Court has intended to keep on those who would override "the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation," Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 716 (1985), the burden effectively remains on the defenders of the presumption. The law is in need of refinement.

This is why we ask the Court to seriously consider applying in preemption

cases an approach to determining clear congressional intent akin to that suggested by Justice Scalia in Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (citing INS v. Chadha, 462 U.S. 919 (1983)), for determining congressional intent to create federal private rights of action. Justice Scalia's rationale for demanding a clear statement of congressional intent in the place of conflicting inferences of "implied" intent appear even more persuasive in preemption cases where the historical police powers of the states are at stake, congressional intent must be clear and unambiguous, and the judicial rule demanding clarity is so longstanding that the Congress has little excuse but to meet it when adopting laws to preempt or displace state and local authority.

It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting

upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor.

I suppose all this could be said, to a greater or lesser degree, of all implications that courts derive from statutory language, which are assuredly numerous as the stars. But as the likelihood that Congress would leave the matter to implication decreases, so does the justification for bearing the risk of distorting the constitutional process. A legislative act so significant, and so separable from the remainder of the statute, as the creation of a private right of action seems to me so implausibly left to implication that the risk should not be endured.

If we were to announce a flat rule that private rights of action will not be implied in statutes hereafter enacted, the risk that that course would occasionally frustrate genuine legislative intent would decrease from its current level of minimal to virtually zero. It would then be true that the opportunity for frustration of intent "would be a virtual dead letter[,] . . . limited to . . . drafting errors when Congress

simply forgot to codify its . . . intention to provide a cause of action." . . . I believe, moreover, that Congress would welcome the certainty that such a rule would produce. Surely conscientious legislators cannot relish the current situation, in which the existence or nonexistence of a private right of action depends upon which of the opposing legislative forces may have guessed right as to the implications the statute will be found to contain.

If a change is to be made, we should get out of the business of implied private rights of action altogether.

Id., 484 U.S. at 192 (citation omitted).

If nothing else, an even stronger presumption against implied preemption should be erected in cases where congressional committees debated the issue, the Congress adopted a specifically expressed preemption provision, and Congress still did not clearly preempt the state or local authority being challenged. See Pet. Br. at 27, 87-89.

II. FIFRA DOES NOT PREEMPT  
LOCAL REGULATION OF  
PESTICIDE USE, NOR PREEMPT  
STATE DELEGATION OF  
AUTHORITY TO LOCAL  
GOVERNMENTS TO SO REGULATE.

Absent the manifestation in FIFRA, or in its history, of a clear congressional intent to preempt local regulation of pesticides, Respondents and their amici are here asking this Court for a ruling that would have the effect of legislating the clear preemption they apparently cannot get from the Congress.

Respondents downplay the express language of FIFRA that works against them under the "clear and manifest purpose" test, and resort to a legislative history that does not speak for the full Congress that voted on that language.

When it enacted FIFRA, Congress had preemption on its "mind." Congress did intend to preempt some state and local regulation in the pesticide arena. Where Congress did intend to preempt, it did so

affirmatively and by making the scope of its intent clear, specific and express. FIFRA §136v(b) and (c). Congress even went to the pains of providing a clear, specific and express anti-preemption provision to preface, limit and clarify the scope of the preemption intended. §136v(a). As if in conscious response to the longstanding "clear and manifest purpose" test of preemption law, the Congress spelled out the limits to which it wanted to, and politically was constrained to, go with its preemptive intent.

Where the Congress goes to such pains to adopt statutory language specifically expressing its intent, especially on a subject such as preemption where its intent must be crystal clear, the courts should be especially hesitant to imply intent that does not follow necessarily from the intent expressed, is not



necessary to fulfill the intent expressed, and against which the law militates, as it does against preemption.<sup>2</sup> This is consistent with the rule that implied intent to preempt is not lightly to be presumed or inferred, especially where, as here, the state or local regulation relates to health and safety concerns which have been "primarily, and historically, a matter of local concern." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. at 719.

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<sup>2</sup>It is only "[i]n the absence of express preemptive language, Congress' intent to pre-empt all state (and local) law in a particular area may be inferred" from various sources. Hillsborough at 713 (emphasis added); Pacific Gas & Electric v. St. Energy Resources Conserv., 461 U.S. 190, 203-04 (1983); Schneidwind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988). Here there is no such absence. There is express, clear and specific preemptive language in FIFRA at §136v. Thus, an externally derived inferred intent that goes beyond or which potentially conflicts with language that was carefully expressed by the Congress on preemption generally should not be inferred at all.

Contrary to Respondents' claims, the limits of the full Congress' intent to preempt can be found in the express provisions of FIFRA.

The express preemption provision of FIFRA is §136v(b). It is what the full Congress voted on and enacted. It means what it says. It clearly preempts states (and necessarily local governments) from enacting pesticide labelling and packaging regulations. Clearly, Congress did not want any level of state government, including local governments, to interfere with or adopt different regulations on pesticide labelling and packaging. §136v(c) further sets limits on state (or local) regulation affecting pesticide registration.

The anti-preemption provision of FIFRA the full Congress voted on, §136v(a), also means what it says. Contrary to Respondents' view, it does not

suggest local governments are preempted, or that the states are preempted from delegating independent or specific authority to regulate pesticides. It is not even a preemption provision. It contains no preemption language. It expressly precludes preemption of state regulation of pesticide sale and use. It expressly allows states to exercise their preexisting sovereign authority to regulate sale and use of federally registered pesticides and, presumably, to choose how that authority is to be exercised. Its allowance of state regulation does not exclude, much less preempt, local regulation. It preempts only state (and obviously local) authorization of pesticide uses that are prohibited by FIFRA.

There is nothing in FIFRA's express language, especially §136v(a), that would lead a common sense reader, including

congressional representatives who voted on it, or local government officials and state legislators acting on it, to conclude that Congress has unequivocally, clearly, or manifestly ordained the preemption of state delegation to their local governments of authority to regulate pesticide use.

As for FIFRA §136v(a)'s history, despite the interpretations of non-adopted FIFRA bills by individual congressional committees and legislators disposed to preempt local regulation, there is no evidence that upon voting on the final legislative package, the full Congress acted with other than the knowledge that the full Senate/House Conference Committee envisioned a very specific provision that preempted regulation of labelling and packaging [§136v(b)], and neither it nor the anti-preemption provision of FIFRA [§136v(a)] went further to expressly or by

necessary implication preempt state authorized local regulation of pesticide use. There is no finding to be made that the Congress of the United States preempted local regulation of pesticide use in FIFRA, much less that preemption of local pesticide regulation was the "clear and manifest purpose of Congress." Rice, 331 U.S. at 230; Florida Lime and Avocado Growers v. Paul, 373 U.S. at 142, 147. That is unless select congressional committees now speak "clearly" for the full Congress assembled.

Respondents et al. hold true to their characterizations of the case, including to their theme that Congress did not clearly "authorize" local pesticide use regulation. Yet, the issue remains whether the full Congress by adopting FIFRA's language clearly and unmistakably preempted local regulation of pesticides. Silkwood v. Kerr-McGee, 464 U.S. 238, 255,

reh. den., 465 U.S. 1074 (1984). It did not.

III. BASING PREEMPTION ON THE  
LANGUAGE AND HISTORY OF  
FIFRA §136v(a) IS  
FUNDAMENTALLY WRONG.

The cornerstone of Respondents' preemption argument is FIFRA §136v(a). They argue the term "State" as used in this section, and the section's legislative history, evince an intent to authorize "State" regulation of pesticide use, and thus not to authorize (and thus preempt) local regulation of pesticide use. R. Br. at 14.

Aside from having to make the above two leaps of logic to get to their conclusion, the most fundamental flaw of attempting to extract preemptive intent from either the words or history of FIFRA §136v(a) is that this section is not a preemption provision at all. By its express terms, it says a state "may regulate" federally registered pesticides



so long as the state does not authorize federally prohibited uses. There is no way anyone employing a common sense reading of it, including members of Congress who voted on it, could conclude that §136v(a) clearly preempts anything other than the authorization by a state of a federally prohibited pesticide use. §136v(a) is an "anti-preemption" provision that clarifies Congress' intent to insulate the great remainder of state regulation that is not expressly preempted by §136v(b) and (c).<sup>3</sup>

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<sup>3</sup>Respondents' miserly concession that FIFRA allows states to "impose stricter pesticide restrictions to account for sensitive local conditions under §136v(a)," R. Br. at 42 (footnote omitted), grossly understates the states' authority to regulate pesticides. States may regulate, even prohibit, pesticides for a wide variety of reasons that go beyond local needs. Respondents' assertion is typical of the mischaracterization that state and local governments are broadly preempted by FIFRA except where §136v(a) "authorizes" only "State" regulation.

§136v(a) is no foundation on which to base a preemption argument, whether the argument is based on the section's legislative language or history. See also U.S. Br. at 13-14.

#### IV. LOCAL REGULATION OF PESTICIDE USE DOES NOT CONFLICT WITH FIFRA.

Respondents argue local regulation of pesticides "conflicts" with FIFRA because it stands as an obstacle to the FIFRA's intent to foster the goals of coordinated pesticide regulation, effective regulation of pesticides, and avoiding an undue burden on interstate commerce. R.Br. at 37-48. The Court has heard and rejected similar complaints before. Hillsborough, 471 U.S. at 720-22.

First, this is but an extension of Respondents' argument that local regulation is inconsistent with the intent of FIFRA. A policy favoring preemption is offered without adding to the resolution

of the question whether Congress unmistakably did preempt local regulation in an expressly preempted field.

Second, we find it ironic that these claims are made in a case where application of the local regulation did not ban or obstruct pesticide application, but merely required after careful deliberation that it be done on the ground rather than by aircraft. I Pet. App. 5-6. Rather than banning pesticide use, the Casey ordinance requires the submission of information on which intelligent permit decisions can be made, and takes into account the needs met and benefits provided by pesticide applications. II Pet. App. 7-11. The ordinance is facially reasonable and does not conflict with the express provisions or policies to be fostered by FIFRA, and certainly does not conflict with effective pest control.

Third, it does not follow that nonuniform local regulation causes unacceptable conflict. FIFRA §136t(b) commands the EPA Administrator to coordinate regulatory activities with local governments and pursue the goal of uniformity through cooperation, not by federal override. While coordination and uniformity are goals of FIFRA to be strived for, Congress contemplated they must be achieved through cooperation, and therefore uniformity may not always be achieved.<sup>4</sup>

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<sup>4</sup>As California et al. correctly concede, "even if Congress has not occupied the field, state and local regulation may be preempted if such regulation 'conflicts' with federal law, assuming that Congress has not chosen to tolerate such conflicts." Cal. Br. at 4 (citations omitted, emphasis added). See Pet. Br. at 72-73 n.72. Congress obviously has chosen to tolerate the conflicts that come with state regulation of federally registered pesticides, FIFRA §136v(a). There remains inadequate intimation Congress drew the line at local regulation.

Fourth, Respondents allege, but do not show precisely how, local regulation of pesticide use renders compliance with federal law a "physical impossibility," Florida Lime, 373 U.S. at 141, or stands as a complete "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in FIFRA. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Hillsborough, 471 U.S. at 713. Clearly, the Casey ordinance does not, and local regulations may not, authorize pesticide uses prohibited under FIFRA [s. 136v(a)]. They may not regulate in the preempted field of labelling or packaging [s. 136v(b)], or interfere with special registration requirements [§136v(c)]. Where they might, such actions would be subject to traditional notions of conflict

preemption, would be invalid as applied, and must yield to the federal law.<sup>5</sup>

Fifth, the conflict claims here closely parallel those made and rejected in Hillsborough. First, the Court rejected as unpersuasive evidence of conflict adduced at hearing, 471 U.S. at

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<sup>5</sup> The argument that a holding in favor of local governments would give them license to act "without regard to the regulations already enacted and enforced at the federal and state levels," Lawn Care Asso. Br. at 1, is specious. Neither Petitioners nor their amici suggest that local governments are free because of FIFRA to override or interfere with affirmative federal or state actions taken under authority of superseding federal or state laws that would prevail under traditional conflict preemption law. Thus, neither the states nor the federal government have anything to fear where, for example, acting pursuant to superseding state or federal laws, government authorities respond in emergencies to outbreaks of gypsy moths, fruit flies, or other health or economically threatening pests. In such cases, conflict preemption principles would negate the individual application of local ordinances, just as FIFRA §136v(a) would negate state authorization of a federally prohibited pesticide.



720-22, evidence of a kind that does not even exist in this case. See this Br. at 30-31. Second, the Court observed that because the federal law and regulations there "establish minimum safety standards," and Congress had not "struck a balance between safety and quantity [of blood plasma]," the Court had no reason to believe reduction in plasma quantities would make the supply "'inadequate.'" Id. at 721. Similarly, FIFRA establishes minimum safety standards, without expressly articulating a balance between pesticide safety and use that must be maintained by non-preempted state regulation. Under FIFRA §136v, States may totally ban or restrict federally registered pesticide uses, which they have. E.g., see sec. 94.707, Wis. Stats. Third, as the "FDA possesses the authority to promulgate regulations pre-empting local regulation that imperils the supply

of plasma," id. at 721, so too may Congress and state legislatures preempt local regulation of pesticides, although not as readily as FDA. Lastly, because of "the significance we attach to the lack of a statement from FDA," id. at 722, "that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma." Id. at 721. There is no lack of a statement from EPA in this case. U.S. Br. at 1. "Local regulation of pesticide use is entirely consistent with the purpose and operation of FIFRA." Id. at 6, 22.

Sixth, a ruling against preemption will not, as some argue (Cal. Br. at 12-13), authorize local governments to enact pesticide regulations over the objections, laws, or actions of the states or federal

government.<sup>6</sup> The Congress and the state legislatures, like California's,<sup>7</sup> would

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<sup>6</sup>The fear that under such a holding "states would be unable to preempt or otherwise restrict local regulation, because the states presumably cannot deny authority to local governments that Congress has expressly granted," Cal. *et al* Br. at 13, of course, is unfounded. As creatures of state legislatures, local governments draw their authority solely from their states, and under our federal system cannot draw authority from the federal government. This unfounded fear points to the misunderstanding that comes from mischaracterizing FIFRA's anti-preemption clause [§136v(a)] as "authorizing" state regulation to the exclusion of local governments. §136v(a) does not authorize, in the sense of granting power, to states or local governments. Clearly, it merely clarifies the limits of the preemptive intent of §136v(b) so as not to preempt authority already possessed by states and local governments to regulate in the field.

<sup>7</sup>*People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984), certainly was not "overruled" by the California Legislature as claimed. R. Br. at 28-29; Cal. Br. at 10 n.8. First, the California Legislature did nothing to affect or change the California Supreme Court's ruling on federal preemption under FIFRA. The Legislature adopted a new state law to preempt local regulation of pesticide use under existing state law. Second, the California Legislature did not "overrule" (continued...)

remain free to adopt, as several states have, policies and laws that retain, preempt, limit, override, coordinate or make uniform various forms of local pesticide regulation. There are many ways, short of preempting local regulation, that the Congress and the states can respond to adjustments that

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<sup>7</sup>(...continued)  
the California court decision even on the state preemption question. The court correctly ruled that neither the existing federal nor state law evinced with sufficient clarity an intent to preempt. The court properly deferred to the Legislature's existing grant of broad authority to local governments to enact police power ordinances. Faced with the Mediterranean fruit fly outbreak, the Legislature changed the state law, as is its prerogative, by expressly preempting the local regulation at issue. The Legislature's action is perfectly reconcilable with the court's ruling on the previous status of the law, and therefore did not "overrule" the court decision. In California, the law of preemption worked. It should be allowed to work the same way here. As in California, state legislatures retain the same power to preempt local regulation of pesticides, and may do so with the speed and clarity seen there. The courts should not, and need not, legislate preemption for them.

might need to be made arising out of regional, county, or municipal pesticide regulation. For example, state laws may require that where local governments wish to enact pesticide lawn posting or wellhead protection zoning ordinances they must conform to a uniform ordinance developed by a state agency. Respondents would deprive states and local governments of their authority to make adjustments that would balance state and local interests.

Seventh, at best Respondents' conflict arguments are policy arguments why Congress should have preempted local governments. At worst, they are a veiled attempt to give this Court reason to legislate the clear statement of preemptory intent Respondents et al. could or did not obtain from the Congress in FIFRA and from other state legislatures. This is a prerogative that only the

Congress and the states have, and to which they may readily avail themselves. Arguments that local governments lack necessary expertise,<sup>8</sup> may interfere with "a coordinated national program," and take action without adequate consideration of state and regional interests, R. Br. at 37-47, are typical complaints that can be levelled against all forms of local regulation. They are more appropriately directed to Congress and state legislatures to strike the "balance" that is appropriate. They add nothing to the determination whether Congress in fact had the unmistakably clear or specific intent to preempt that is required in the preemption analysis.

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<sup>8</sup>Many local ordinances do not require special expertise for their drafting or administration. Where they do, local governments can obtain expertise from their own citizens, extension services, land grant colleges, or even hire it where necessary.



The law of preemption should be allowed to work as it has always been contemplated. If due to the policy arguments presented by Respondents the majority of Congress truly wishes to preempt local regulation of pesticides, then it has within its power to make that intent clear. At present, it is not.

V. THE SPECULATIVE CLAIM THAT LOCAL REGULATION OF PESTICIDES COULD CREATE AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE DOES NOT MAKE A CASE FOR PREEMPTION.

First, the original interstate commerce claim of Respondents in this case was never addressed by the Wisconsin courts and is not properly at issue in this review. See Pet. Br. at 9 n.3; 60, n.15; 61. Even if it were, the question is a combined legal and factual one that only may be resolved after an evidentiary hearing. Hillsborough, 471 U.S. at 720-21; Hughes v. Alexandria Scrap Corp., 426

U.S. 794, 830-31 (1976) (Brennan, J., dissenting); Southern Pacific Co. v. Arizona, 325 U.S. 761, 770-71 (1945). Petitioners dispute the factual claims of Respondents and their amici that ordinances unreasonably interfere with interstate commerce or that local regulation of pesticides is inherently inimical to it.<sup>9</sup>

Second, the actual commerce claim raised for the purposes of this review is that local regulation of pesticides is an obstacle to a claimed policy goal in FIFRA to avoid undue burdens on interstate commerce. R. Br. at 46. This adds nothing to help resolve the issue at hand, however. This assertion is one step removed from the issue whether the full

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<sup>9</sup>Respondents must "overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation," Hillsborough, 471 U.S. at 716, and the burden may not be overcome by unsubstantiated speculation. Id. at 720.

Congress clearly preempted local regulation. The issue is not whether policy can be found to justify the claimed preemption. That the record shows the same committees and legislators who wished to preempt local regulation wished to do so to avoid burdens on interstate commerce does not demonstrate the full Congress clearly did adopt such a policy, or that Congress sufficiently acted to preempt local regulation in furtherance of that policy.

It is not a foregone conclusion that Congress always intends to preclude all interferences with interstate commerce. It may choose to "redefine the distribution of power over interstate commerce . . . (and) permit the states to regulate commerce in a manner which would otherwise not be permissible." Southern Pacific Co. v. Arizona, 325 U.S. at 769. Congress may, as it did in FIFRA §136v,

authorize state actions that may interfere with interstate commerce over which the Congress has superior regulatory dominion. Northeast Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 174 (1985). Thus, congressional intent to adopt the policy espoused by Respondents is not to be presumed, and no clear showing of preemption to carry out the policy has been made.

Third, that local regulation speculatively "could" increase crop loss, "could" impose administrative costs, "could" impose burdens on interstate commerce, R. Br. at 47, is hardly grounds for overcoming the presumption that local, state and federal regulation in the field can coexist. In real Commerce Clause cases, "an adequate record containing the relevant factual material which will afford a sure basis for an informed judgment is required . . . . Such a record

is lacking in the instant case." Hughes v. Alexandria Scrap Corp., 426 U.S. at 830-31 (Brennan, J., dissenting) (citations and quotations omitted), citing Southern Pacific Co. v. Arizona, 325 U.S. at 761. See also Pet. Br. at 9 n.3; 60 n.15.

Fourth, "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." Northeast Bancorp., 472 U.S. at 174. FIFRA §136v(a) expressly "authorizes" continued state regulation of pesticide use. State regulation is invulnerable to Commerce Clause attack. Local regulation of pesticides is similarly invulnerable to Commerce Clause attack where, as here, Congress' authorization of state pesticide regulation normally presumes the right of states to delegate their pesticide regulatory authority to their local

governments, or where local governments have not been clearly preempted or clearly excluded from §136v(a)'s anti-preemption protection.

VI. THAT STATES REMAIN FREE TO ASSIGN STATE REGULATORY PROGRAMS TO LOCAL GOVERNMENT ADMINISTRATION DOES NOT LEAD TO THE CONCLUSION THAT LOCAL GOVERNMENTS MAY NOT INDEPENDENTLY REGULATE PESTICIDES.

Despite citations to congressional reports that demonstrate individual committee interpretations of FIFRA "as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and regulation of pesticides," R. Br. at 21-22 (emphasis deleted and retained in part), Respondents curiously assert for the first time in the history of this case the fallback position that Congress did not intend to completely preempt local regulation after all.



California et al. argue "that Congress preempted local governments from regulating pesticide use does not necessarily mean that Congress preempted the states' authority to delegate authority to local governments to administer the state's own regulatory program." Cal. Br. at 20 (emphasis added). This non-committal statement suggests somehow Congress made the distinction in FIFRA to preempt "independent" local regulation of pesticide use, but not to preempt local regulation that is part of a state regulatory program, or local regulation having only "incidental" effect on pesticide regulation. R. Br. at 14, 31-36, California et al. Br. at 20.

First, it is difficult enough to make a case of clear congressional intent to preempt out of the anti-preemption provision in FIFRA §136v(a), without heaping on top of it the tortured

assertion that Congress went further in FIFRA §136v(a) to clearly preempt only "independent" local regulation of pesticide use (while surgically exempting locally administered state regulation). Proponents of this theory of partial preemption cite no evidence in the express language of FIFRA's preemption/anti-preemption section or in the legislative history of FIFRA to support it. Although not adequate to demonstrate a full congressional intent to preempt, the intentions stated by the congressional committees that supported preemption was for total preemption of local regulation. R. Br. at 21-24, 26. There is no evidence that even suggests the congressional committees or the full Congress considered, much less adopted, a distinction in FIFRA §136v between preemption of "independent" local regulation of pesticides, while

authorizing local administration of state pesticide regulatory programs. The claim is baseless.

Second, the argument that Congress intended there to be a distinction between permissible specific v. impermissible general delegation of authority from states to local governments to regulate pesticides boils down to what Respondents, and some of their amici, wish the Congress had adopted as a matter of policy and law. Apparently wishing to eat their cake and have it too, Respondents essentially ask this Court to legislate a policy position never considered by the Congress. There is no intimation, let alone a clear and manifest one, in the record cited by Respondents to support such a distinction. Nor is there any intimation Congress considered preempting local zoning or other regulation having more than "incidental regulatory effect on

pesticides." R. Br. at 14. The issue returns to whether Congress clearly spoke with one voice in preempting states from allowing their local governments, pursuant to specific or general delegation of authority, to regulate pesticide use. It did not.

Third, California et al. argue the non sequitur:

[T]he Tenth Amendment does not, we believe, preclude Congress from restricting distribution of legislative power where the state does not establish its own regulatory program, and instead transfers its regulatory authority to local governments . . . .

Cal. Br. at 22.

No basis in law for this unique position is offered, nor is there basis in logic for the distinction it attempts to draw. We know of no constitutionally-based distinction to draw for states that make the decision to allow their local governments to regulate pesticides through

a general delegation of the state's police power as opposed to a specific delegation.

California et al. cite City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), as indicative of this Court's familiarity with "distinctions between local action that is authorized under specific state delegations of authority and local action that is not so authorized." Cal. Br. at 25. But, the distinction drawn in that and attendant cases was not for tenth amendment purposes. Rather, it was one the Court recognized to fulfill congressional intent in the Sherman Act. The lesson of Lafayette supports Petitioners, not Respondents et al.

Lafayette discussed the distinction between municipalities acting on behalf of the state verses municipalities acting under general authority in the context of the issue there whether Congress intended

under the Sherman Act to regulate local governments. 435 U.S. at 391, 397, 410, 413. The cases leading up to Lafayette (e.g., Parker v. Brown, 317 U.S. 341 (1943)) make it clear that the Sherman Act has been construed as not intending to regulate states (including their municipalities acting as arms of the states), but that it does regulate municipalities where they are not so acting. "[W]e are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." Lafayette, 435 U.S. at 413 (emphasis added). Thus, the cited cases merely return us to the primary issue of FIFRA's intent to preempt local regulation of pesticides. See also id., 435 U.S. at 430, (Stewart, J., dissenting). Unlike the situation in Lafayette, there is no basis on which to conclude Congress necessarily intended to make the



distinction for preemption purposes in FIFRA that it had to have made in the Sherman Act with regard to anti-competitive activities by municipalities. Cf., Lafayette, 435 U.S. at 433 (Stewart, J., dissenting).

As to the policy underlying the Sherman Act, the Court stated in Lafayette, "To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws." Id. at 415. This again returns us to the issue of congressional intent; specifically, whether Congress so clearly adopted a policy so discriminately against "independent" local regulation of pesticides as to lead to the inescapable conclusion that Congress clearly intended to preempt it, while at the same time carving out an exception for local

administration of state programs. Under the clear intent test, the answer is no.

Lastly, Lafayette, as in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (see Pet. Br. at 87-95), saw four Justices in dissent that legitimately question the validity of the distinction when made both in the context of the congressional legislation (Sherman Act) and of tenth or eleventh amendment analysis. 435 U.S. at 430, 432, 433, 434 (Stewart, J., dissenting). The test of state direction or legislative contemplation of activity conducted by local governments is "elusive." 435 U.S. at 435 (Stewart, J., dissenting). More importantly,

Under our federal system, a State is generally free to allocate its governmental power to its political subdivisions as it wishes. A State may decide to permit its municipalities to exercise its police power without having to obtain approval of each law from the legislature. Such local self-

government serves important state interests. It allows a state legislature to devote more time to statewide problems without being burdened with purely local matters, and allows municipalities to deal quickly and flexibly with local problems. But today's decision, by demanding extensive legislative control over municipal action, will necessarily diminish the extent to which a State can share its power with autonomous local governmental bodies.

Id. at 434-35 (footnotes omitted). See also, id. at 435-38; Community Commun. Co. v. City of Boulder, 455 U.S. 40, 70-71 (1982) (Renquist, J., dissenting). These are the same concerns raised by the four dissenting members of the Court in Garcia, 469 U.S. at 560, which give rise to Petitioners' tenth amendment concerns. See Pet. Br. at 90-102. The distinction raised by California et al. has no persuasive relevance either to the statutory intent of FIFRA or to the Constitutional question presented.

# CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of Wisconsin and remand the matter with instructions to enter judgment in favor of Petitioners declaring valid the Town of Casey Ordinance 85-1.

Dated this 16th day of April, 1991.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

WISCONSIN PUBLIC INTERVENOR AND  
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v.

RALPH MORTIER, ET AL.

ON WRIT OF CERTIORARI TO THE  
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING PETITIONERS

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## QUESTION PRESENTED

The United States will address the following question:

Whether the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*) preempts the regulation of pesticide use by local units of government.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1905

WISCONSIN PUBLIC INTERVENOR AND  
TOWN OF CASEY, PETITIONERS

v.

RALPH MORTIER, ET AL.

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING PETITIONERS

## INTEREST OF THE UNITED STATES

The Environmental Protection Agency (EPA) is responsible for administering the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, and therefore has a substantial interest in questions concerning the scope of FIFRA's preemption. At the Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

## STATEMENT

1. First enacted in 1947, FIFRA was substantially revised by the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-576, 86 Stat.

973. The 1972 amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). The legislation was a response to "mounting public concern about the safety of pesticides and their effect on the environment and \* \* \* a growing perception that the existing legislation was not equal to the task of safeguarding the public interest." *Ibid.*

The revised FIFRA regulates the use, sale and production of pesticides, and provides for review, cancellation, and suspension of pesticide registrations. See generally 7 U.S.C. 136 *et seq.* Congress charged the Administrator of EPA with administering the program, and gave him a broad variety of responsibilities for discharging this mandate. See, *e.g.*, 7 U.S.C. 136a, 136f, 136p, 136q, 136r, 136u, 136w. Of particular relevance to this case, Section 24(a) of the revised FIFRA specifies that States may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act. 7 U.S.C. 136v(a).

2. In September 1985, the Town of Casey, in Washburn County, Wisconsin, adopted Town Ordinance 85-1, which regulates the use of pesticides. II Pet. App. C1-C17. The ordinance requires a permit prior to application of any pesticide to public lands or private lands subject to public use, and prior to any aerial application of pesticides to private lands. *Id.* at C6. A permit applicant must submit information concerning the proposed pesticide application to the Town Board, at least 60 days prior to the proposed use. *Id.* at C7-C11. The Town Board may grant the permit, deny it, or grant it with "reasonable conditions \* \* \* related to the protection of the health, safety, and welfare of the residents of

the Town of Casey." *Id.* at C11-C12. The ordinance provides hearing rights for the permit applicant, or for any town resident. *Id.* at C12. If a permit is granted or granted with conditions, the permittee must post a placard giving notice of pesticide application and of any label information prescribing a safe reentry time. Violators of the ordinance are subject to a fine of up to \$5000 for each violation. *Id.* at C15-C16.

3. a. Respondent Ralph Mortier applied for a permit to spray a portion of his land with a pesticide. The Town granted him a permit, but precluded aerial spraying and limited the land area that could be sprayed. I Pet. App. 5-6.

b. Respondents brought a declaratory judgment action in the Washburn County Circuit Court claiming that the Town of Casey's ordinance is preempted by state and federal law. The Washburn County Circuit Court ruled that both state and federal law preempt the regulation of pesticides by local governments, and that Ordinance 85-1 is therefore invalid. II Pet. App. B14-B15.

c. The Supreme Court of Wisconsin affirmed in a 4-3 decision. The majority concluded that the Town of Casey's ordinance is preempted by FIFRA. Recognizing that FIFRA explicitly permits state regulation of pesticides (§ 24(a), 7 U.S.C. 136v(a)), the majority concluded that the language of the statute and its legislative history reveal Congress's "clearly manifested intent \* \* \* to preempt any regulation of pesticides by local units of government." I Pet. App. 25.<sup>1</sup> The dissenting Justices concluded that the stat-

<sup>1</sup> The majority declined to "address the question of whether the enactments of the Wisconsin legislature also preempt the Town ordinance" (I Pet. App. 5 n.2), and decided only the



utory language and legislative history were insufficient to express an intent to preempt local regulation. *Id.* at 9-25 (Abrahamson, J., dissenting); *id.* at 1-9 (Steinmetz, J., dissenting).<sup>2</sup>

question of federal preemption. Because the court relied on federal grounds, this Court has jurisdiction to review and decide the federal issue. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1040-1042 (1983); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-568 (1977). See also *California v. Ramos*, 463 U.S. 992, 997-998 n.7, 1014 (1983) (reversing with respect to the federal question and remanding the undetermined state law issue).

In addition to the Wisconsin Supreme Court in this case, two federal courts of appeals have held that FIFRA preempts regulation by local governments of pesticide use. *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990), petition for cert. pending, No. 90-382; *Maryland Pest Control Ass'n v. Montgomery County*, 822 F.2d 55 (4th Cir. 1987) (Table), summarily aff'g 646 F. Supp. 109 (D. Md. 1986); see also *Maryland Pest Control Ass'n v. Montgomery County*, 884 F.2d 160, 161-162 (4th Cir. 1989) (noting, in attorney's fees litigation, that it had previously affirmed district court holding that local pesticide ordinances "were invalid under FIFRA" and that "FIFRA preempted local laws"), cert. denied, 110 S. Ct. 1524 (1990). In conflict with these decisions, two state courts of last resort have held that FIFRA does not preempt local regulation of pesticide use. *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990); *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984). One federal district court also has held that FIFRA does not preempt local regulation of pesticide use. *Coparr, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), appeal pending, No. 89-1341 (10th Cir.) (argued Jan. 15, 1991).

<sup>2</sup> The first volume of the Petition Appendix contains the majority opinion and the two dissenting opinions; the pagination of the opinions in the Appendix is not consecutive.

## SUMMARY OF ARGUMENT

FIFRA does not preempt local government regulation of pesticide use. The statutory language of FIFRA plainly is inadequate in itself to warrant a conclusion of preemption. As to FIFRA's legislative history, there are some strong and directly relevant committee statements favoring preemption of local regulation, but the legislative history does not point entirely in one direction. In our view, that history does not demonstrate that Congress "unmistakably \* \* \* ordained" preemption of all local regulation of pesticide use. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Nor do the purpose and operation of FIFRA require federal preemption of all local regulation of pesticide use.

1. The statutory language does not explicitly preempt local regulation of pesticide use. The state court erred in concluding that the express authorization of state regulation, provided in Section 24(a), necessarily bars local authority. The explicit authorization of state regulation may be interpreted as leaving the internal allocation of regulatory authority to the discretion of each State, including the possible allocation of authority to local governments. Contrary to the state court's suggestion, other provisions of FIFRA also do not support a conclusion of preemptive intent in Section 24(a). Indeed, it is apparent that "State" as used in another provision of the Act, Section 23(a), necessarily includes political subdivisions.

2. Nor does FIFRA's legislative history evidence a clear and manifest intent to preempt local regulation of pesticide use. Although there are some strong committee statements favoring preemption of local regulation, the legislative history shows serious dis-



agreement among Members of Congress concerning the issue of local government regulation of pesticides. In light of that disagreement, the lack of a clear statement of preemption in the statutory text, coupled with the powerful presumption against inferring preemption of local government authority in matters of public safety and health, persuades us that insufficient evidence exists of a "clear and manifest purpose" (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) to deprive local governments of the ability to regulate the use of pesticides.

3. Local regulation of pesticide use is entirely consistent with the purpose and operation of FIFRA. Indeed, FIFRA's implementation contemplates, and can be enhanced by, a regulatory partnership between federal, state and local governments. Section 22(b) expressly recognizes this multi-level approach by directing the Administrator to "cooperate with \* \* \* any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this [Act], and in securing uniformity of regulations." 7 U.S.C. 136t(b).

## ARGUMENT

### FIFRA DOES NOT PREEMPT LOCAL REGULATION OF PESTICIDE USE

The framework for analyzing preemption issues is well established. As this Court recently reiterated, the "question whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990) (internal quotation marks omitted). Preemption can occur through explicit statutory provisions; through implication if the federal role is pervasive, if the federal interest is sufficiently dominant, or if the structure and purpose of the statute establish preemptive intent; or through a conflict between state law and federal law. See *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). "[T]he historic police powers of the States [are] not to be superseded" by federal legislation "unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The same principles govern with respect to challenges to local, as opposed to state, ordinances. See *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); see also *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Finally, reluctance to infer preemption is especially strong where, as here, the state or local regulation relates to health and safety concerns which have been, "primarily, and historically, a matter of local concern." *Hillsborough*, 471 U.S. at 719.

The Wisconsin Supreme Court concluded that Congress's "clearly manifested intent" was to preempt local regulation of pesticide use. I Pet. App. 24-25. In its view, the statutory language, "coupled with the legislative peregrinations of the pesticide bill, unmistakably demonstrates the intent of [C]ongress to preempt local ordinances such as that adopted by the Town of Casey." *Id.* at 22. We disagree. Neither the statutory language nor the legislative history is sufficiently clear to establish preemption; what is more, FIFRA's purpose and operation also do not require preemption of local government regulation of pesticide use.<sup>3</sup>

**A. The Language of FIFRA Does Not Establish A Clear And Manifest Purpose To Preempt Local Regulation of Pesticide Use**

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). The statutory language is plainly inadequate in itself to warrant a conclusion of preemption. Indeed, the state court both finds the statutory language "ambiguous" (I Pet. App. 15) and

<sup>3</sup> The dissenting Justices on the Wisconsin Supreme Court observed that "[t]he majority opinion does not fit into the traditional preemption analysis" of three categories (express, implied, and conflict), and that "[t]he majority opinion apparently attempts to find express preemptive intent not in the text of the statute but in legislative history." I Pet. App. 9 n.3 (Abrahamson, J., dissenting). Cf. *Professional Lawn Care Ass'n*, 909 F.2d at 933 (noting that "FIFRA does not preempt the village ordinance by its express terms" and that "[o]ur analysis of FIFRA and its legislative history leads us to conclude that when Congress rewrote the statute, it impliedly preempted the local regulation of pesticides").

relies extensively on that language (*id.* at 22-25). But the particular statutory provisions fail to convey the meaning ascribed to them by the state court.

The text contains no express preemption of local authority to regulate pesticide use. The state court nevertheless placed great weight on the specific authorization to States to regulate pesticide use. I Pet. App. 22-23. Section 24(a) of FIFRA provides that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. 136v(a).<sup>4</sup> The state court concluded that, "[f]rom this alone, it is possible to infer that regulation by other governmental entities not protected from preemption \* \* \* is preempted." I Pet. App. 23.

The explicit authorization of state regulation, however, does not require the conclusion that local governments are preempted from regulating pesticide use. It is entirely plausible to read the provision as leaving the internal allocation of regulatory authority to the discretion of each State, including the possible allocation of authority to local governments. See *Mendocino County*, 36 Cal. 3d at 491-492, 683 P.2d at 1159-1160, 204 Cal. Rptr. at 906-907; *Professional Lawn Care Ass'n*, 909 F.2d at 935-936 (Nelson, J., concurring). The principle is well established that local governments are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and that "[p]olitical subdivisions \* \* \* have

<sup>4</sup> The words "federally registered" were added by a 1978 amendment. See Federal Pesticide Act of 1978, Pub. L. No. 95-396, § 22, 92 Stat. 835.



been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Sailors v. Board of Educ.*, 387 U.S. 105, 107-108 (1967) (internal quotation marks omitted). See also *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). A statutory specification that States have regulatory authority, without explicit reference to local governments, therefore does not necessarily establish preemptive intent with respect to the local governments.<sup>5</sup>

Indeed, to read the authorization of regulation by States and silence on local governments as preempting local governments by negative implication is not faithful to the cardinal principle that preemption will not be inferred unless there is a clearly manifested congressional intent. As we have noted, it is settled that, "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough*, 471 U.S. at 713. Silence with respect to state authority clearly does not suffice to establish express preemption of state authority, and silence

<sup>5</sup> The Wisconsin Court referred to the "exclusion rule" (I Pet. App. 24)—apparently a reference to the maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another). The court suggested that, because local governments are not explicitly mentioned in Section 24(a), they are "excluded" from its scope and "deprived of the right to regulate the use of pesticides." *Ibid.* As the California Supreme Court explained, however, "[b]ecause local governmental agencies are political subdivisions of the state, the maxim may not be applied. The maxim may be applied to comparable or perhaps similar nouns, but there is no reason to apply it to exclude agents of the enumerated party." *Mendocino County*, 36 Cal. 3d at 491, 683 P.2d at 1160, 204 Cal. Rptr. at 907.

with respect to local authority is similarly inadequate to establish express preemption of local authority—regardless of whether state authority is expressly sanctioned. This principle is especially compelling in the context of this case because regulation of pesticide use is directly related to the traditional health and safety concerns of local governments. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 990-991; *Hillsborough*, 471 U.S. at 719.

The state court referred to a variety of other provisions in an attempt to bolster its reliance on Section 24(a). The court referred to FIFRA's definition of "State," which does not include local governments. I Pet. App. 24.<sup>6</sup> Because local governments are subordinate entities of the State itself, however, this provision adds nothing to the analysis and fails to establish that the statutory grant of authority to States in Section 24(a) excludes further state delegation to local governments. The state court also found it "significant" that the statute explicitly refers to "political subdivisions" in some provisions (I Pet. App. 24), and cited one such instance (*ibid.*)—the requirement in Section 22(b) that EPA cooperate with "any appropriate agency of any State or any political subdivision thereof." 7 U.S.C. 136t(b). Far from establishing an express preemptive intent, however, that provision equates political subdivisions with state agencies. Just as it would be untenable to contend that a State may not regulate pesticide use through a state agency simply because state agencies are enumerated in Section 22(b) but not

<sup>6</sup> 7 U.S.C. 136(aa) provides, "The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa."



Section 24(a), so too it is unpersuasive to contend that political subdivisions are similarly preempted.

Other statutory references to political subdivisions and local governments are no more helpful to the state court's attempt to establish express preemptive intent through Section 24(a). Indeed, the interaction of the various statutory provisions undermines such a contention. For instance, Section 8(b), which concerns enforcement, requires manufacturers to produce records for inspection "upon request of any officer or employee of the Environmental Protection Agency or of any *State or political subdivision*, duly designated by the Administrator." 7 U.S.C. 136f(b) (emphasis added). Section 23(a)(1), in turn, authorizes the Administrator to enter into cooperative agreements with "States" to "delegate to any *State* \* \* \* the authority to cooperate in the enforcement of [the Act] through the use of its personnel." 7 U.S.C. 136u(a)(1) (emphasis added). It is thus apparent that "State" as used in Section 23(a) necessarily includes political subdivisions, since Section 8(b) makes clear that officers of political subdivisions may be designated as inspectors. As pointed out by the concurrence in *Professional Lawn Care*, if "State" includes political subdivisions in Section 23 of the Act, "it can hardly be a forgone conclusion" that "State" excludes political subdivisions when it appears in Section 24(a). 909 F.2d at 936-937.<sup>7</sup>

<sup>7</sup> Two other references to local governments in the 1972 version of FIFRA similarly do not establish preemptive intent from the silence regarding local governments in Section 24(a). Section 20(b) requires the Administrator to formulate and periodically revise a national plan for monitoring pesticides "in cooperation with other Federal, State, or local agencies," and Section 20(c) likewise provides that monitor-

Furthermore, in contrast to Section 24(a), FIFRA also contains a provision specifically requiring, for a different purpose, that a State exercise its authority through a state-wide entity. Section 11(a)(2)(A), as currently codified, concerns state certification of pesticide applicators—which is distinct from state regulation of pesticide use—and specifically requires, in pertinent part, that an acceptable state plan must "designate[] a state agency as the agency responsible for administering the plan throughout the State." 7 U.S.C. 136i(a)(2)(A).<sup>8</sup> Section 24(a) contains no such explicit provision for a state-wide program with respect to state regulation of pesticide use.

Finally, even if Section 24(a) applies only to States and not to local governments, the state court's implicit corollary—that local governments therefore

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ing procedures "shall be carried out in cooperation with other Federal, State, and local agencies." 7 U.S.C. 136r(b) and (c). Far from supporting an inference of preemption, these Sections suggest that an active role for local governments in pesticide issues is contemplated.

Two subsequent amendments also refer to local governments and similarly are more suggestive of participation by such governments than of preemptive intent. See 7 U.S.C. 136d(g) (requiring notices to the EPA Administrator and to "appropriate State and local officials" of the storage of pesticides with cancelled or suspended registrations); 7 U.S.C. 136w(e) (referring to peer review of studies by federal agencies, by "any State or political subdivision thereof," and by institutions under EPA contract, grant, or cooperative agreement).

<sup>8</sup> This Section was in Section 4 of the 1972 revision of FIFRA (see 86 Stat. 983); it was transferred to Section 11 of FIFRA in 1988. See Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, § 801(q)(1)(A) 102 Stat. 2683.

have no authority to regulate pesticide use—does not follow. For, even if Section 24(a) confers some regulatory authority on the States that might otherwise be considered preempted as inconsistent with, or repugnant to full effectuation of, the federal program, that does not mean that Congress otherwise sought to occupy the entire regulatory field and prohibit all regulation by local governments. Thus, Congress's omission of local governments from the affirmative authorization of Section 24(a) would mean only that local government ordinances are subject to the usual preemption analysis accorded local ordinances (see, e.g., *Hillsborough County v. Automated Medical Laboratories, Inc.*, *supra*), rather than the terms of the special statutory authorization given to States under Section 24(a) (explicitly allowing any regulation of sale or use so long as it does not permit a sale or use "prohibited" under FIFRA).

With respect to the statutory text, then, Congress's silence on local governments in Section 24(a) does not establish preemptive intent; even if Section 24(a) is construed to exclude local governments from its scope, the result of such an interpretation should be not a blanket deprivation of regulatory authority to local governments, but evaluation of local regulations under the usual standard for evaluating federal preemption of local authority.

**B. The Legislative History of FIFRA Does Not Establish A Clear And Manifest Purpose To Preempt Local Regulation Of Pesticide Use**

Turning to FIFRA's legislative history, indications of congressional intent on preemption present a close question. Some relevant committee statements clearly favor preemption of local regulation. But the legislative history does not point exclusively

in that direction, and, in our view, fails to demonstrate that Congress "unmistakably \* \* \* ordained" preemption of all local regulation. *Florida Lime & Avocado Growers*, 373 U.S. at 142.

In this case, the Wisconsin Supreme Court focused principally on three aspects of the legislative history—the House Committee on Agriculture report, the Senate Committee on Agriculture and Forestry report, and a conflict between the Senate Committee on Agriculture and Forestry and the Senate Committee on Commerce. I Pet. App. 16-22. We shall discuss each in turn.

The House Agriculture Committee report, filed on September 25, 1971, states that "[t]he Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971).<sup>9</sup> The House Agriculture Committee's bill explicitly recognized the authority of States to regulate pesticide use and sales, but it did not refer to local governments; the bill also limited the authority of States to regulate "general use" (as opposed to "restricted use") pesticides.<sup>10</sup> On the

<sup>9</sup> Among other proposals, the Nixon Administration's proposed bill would have specified that the Act should not be construed as limiting the authority of States or political subdivisions to regulate pesticide sale or use, so long as any such regulation did not permit a sale or use prohibited by the Act. H.R. 4152, 92d Cong., 1st Sess. § 19(c) (1971), reprinted in *Hearings on Federal Environmental Pesticide Control Act of 1971, Before the House Comm. on Agriculture*, 92d Cong., 1st Sess. 904 (1971).

<sup>10</sup> Section 24(a) of the House Committee's proposed bill provided, "A State may regulate the sale or use of any



floor of the House, an amendment was accepted deleting the limitation on the regulation of "general use" pesticides. See 117 Cong. Rec. 40,044-40,045, 40,065, 40,067-40,068 (1971).<sup>11</sup> The floor debate on the amendment to Section 24(a) concerned the restriction on state regulation of "general use" pesticides and did not specifically address the role of local governments in regulating pesticide use. See 117 Cong. Rec. 40,034-40,046 (1971).<sup>12</sup> With respect to the House Agriculture Committee report itself, although a decision not to authorize regulation is not necessarily coextensive with a decision to preempt, the House Committee report may be read to provide

pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act or restrict by license or permit the use of a pesticide registered for general use." H.R. Rep. No. 511, *supra*, at 64 (emphasis added).

<sup>11</sup> The version that passed the House was thus the version passed by the House committee, with a deletion of the italicized language in note 10, *supra*. See 117 Cong. Rec. 40,044 (1971).

<sup>12</sup> The House floor debate on the "general use" restriction included brief references, in the context of that debate, to local governments. See 117 Cong. Rec. 40,037 (1971) (Rep. Anderson) ("[T]he Federal law must establish a floor. That is to say, California and Alaska must meet certain minimum Federal standards, but if the situation exists, the state and local governments may enact more stringent requirements."); *id.* at 40,066 (Rep. McKinney) ("[B]y preempting individual States from enacting tougher regulations on 'general use' pesticides, this bill negates the excellent initiatives displayed by States like New York. Section 24 of H.R. 10729, by posting overall Federal standards, fails to recognize that particular needs created by local conditions such as climate, pest population, and population density are best handled by State and local agencies.").

some evidence of congressional opposition to local regulation of pesticides.<sup>13</sup>

The Senate Committee on Agriculture and Forestry report contains a more emphatic statement. It declares that the Committee "considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives." S. Rep. No. 838, 92d Cong., 2d Sess. 16 (1972).<sup>14</sup>

<sup>13</sup> It is also possible that, as the California Supreme Court concluded, the House report should be given a more limited reading. See *Mendocino County*, 36 Cal.3d at 492, 683 P.2d at 1160, 204 Cal. Rptr. at 907 ("The report of the House Committee on Agriculture did not state that political subdivisions should be prohibited from regulating but only that they should not be authorized to regulate. This is consistent with the ordinary view that states are free to distribute regulatory power between themselves and their political subdivisions.").

<sup>14</sup> The Senate Agriculture Committee report further states: Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.

S. Rep. No. 838, *supra*, at 16-17. The language of the provision adopted by the Senate Agriculture Committee was iden-



Thus, if the Senate and House Agriculture Committee reports on the bill were the only evidence of congressional intent, the issue would be whether these statements should be given effect even though the statutory language does not itself clearly express a congressional intent to preempt local regulation.

The Senate Commerce Committee also had jurisdiction over the bill, however, and its role suggests that Congress contained conflicting views on local regulation of pesticide use. The Commerce Committee's report noted that, "[w]hile the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner." S. Rep. No. 970, 92d Cong., 2d Sess. 27 (1972) (emphasis added). The Commerce Committee was particularly concerned because "[m]any local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators." S. Rep. No. 970, *supra*, at 27. The Commerce Committee therefore proposed, among numerous other amendments, an amendment explicitly authorizing local regulation of pesticides. *Id.* at 6, 27-28, 44. After intense negotiations between the two committees regarding the various amendments, the Commerce Committee's amendment explicitly granting regulatory authority to local governments was not adopted.<sup>15</sup>

tical to the language that had been adopted in the House. See *id.* at 71.

<sup>15</sup> See 118 Cong. Rec. 32,251 (1972) (Sen. Talmadge) (referring to "the long period of time of negotiations between the two committees, which lasted for virtually 2 months" and concerned "63 amendments" proposed by the

Instead, the Senate approved a bill that included the Section 24(a) language initially recommended by the Senate Agriculture Committee. The Commerce Committee, however, never disavowed its view that the bill itself did not preempt local regulation.<sup>16</sup>

The versions of Section 24(a) that passed the House and Senate were therefore identical, and the Conference Report does not comment on the provision. See H.R. Rep. No. 1540, 92d Cong., 2d Sess. 33 (1972) (discussing Section 24(c), which concerns registration, but not Section 24(a)).

As a result of these competing strains in the legislative history, Justice Abrahamson's conclusion in her dissenting opinion below—that the "members of both Senate committees agreed to disagree on the issue of preemption of local regulation" (I Pet. App. 20 (dissenting opinion))—is an entirely plausible reading of the legislative record.<sup>17</sup> That record thus

Commerce Committee); *id.* at 32,257-32,258 (reporting Commerce Committee amendments that led to changes in the Senate bill and noting that the Commerce Committee's set of three amendments regarding regulatory authority for local governments (Amendment No. 10) was not adopted in the compromise bill).

<sup>16</sup> Indeed, in a supplemental report, the Agriculture and Forestry Committee seemed to accept that it was the language in its original report, and not the language of the statute, that purported to preempt local regulation. In describing the amendments proposed by the Commerce Committee, the Agriculture Committee noted that the purpose of the Commerce Committee's amendment on local government authority was "to vitiate the language contained in the report of the Committee on Agriculture and Forestry, Report No. 92-838, at page 16." S. Rep. No. 838, 92d Cong., 2d Sess. Pt. II, at 46-47 (1972) (emphasis added).

<sup>17</sup> See also *Mendocino County*, 36 Cal.3d at 493, 683 P.2d at 1161, 204 Cal. Rptr. at 908 ("The history of the Senate

is not sufficiently free from ambiguity to supply what is lacking in the statutory text: a clear and manifest statement of intent to preempt. See also I Pet. App. 13-14 & n.4 (Abrahamson, J., dissenting) and authorities cited therein. Contrary to the state court majority's suggestion (I Pet. App. 21), moreover, the fact that an Agriculture Subcommittee chairman reiterated the Senate Agriculture Committee's initial view to the limited extent of inserting it into the Congressional Record<sup>18</sup> does not establish that this view was shared by the Commerce Committee, which also had jurisdiction over the bill, or by the Senate as a whole.<sup>19</sup>

proceedings establishes only that there was a compromise and that under that compromise the Committee on Commerce's intention to authorize local government regulation was rejected. The act provides a 'state' may regulate, which would ordinarily be interpreted as permitting the states to delegate their power, and nothing in the compromise explanation precludes such delegation."); *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d at 1193 (agreeing with *Mendocino County* reading of legislative history); *Coparr, Ltd.*, 735 F. Supp. at 366-367 (same).

<sup>18</sup> Senator Allen inserted "an explanation of [the bill] as it appeared in the original report of the Committee of Agriculture and Forestry" (118 Cong. Rec. 32,252 (1972)), which included, among many other things, the paragraph concerning the authority of local governments from the initial report (*id.* at 32,256).

<sup>19</sup> The state supreme court incorrectly suggested that "the full Senate \* \* \* rejected the amendment proposed by the Senate Commerce Committee." I Pet. App. 20. Although the Senate Commerce Committee's amendment was not included in the compromise bill hammered out by the Agriculture and Commerce Committees, the Commerce Committee's amendment on local government authority was never addressed by the full Senate. See 118 Cong. Rec. 32,257-32,258, 32,262

Thus, although the legislative history contains evidence of a desire by at least some Members of Congress to preempt all local government regulation, that view was by no means uniform among the bill's authoritative supporters. In light of this disagreement, the lack of a clear statement of preemption in the statutory text and the powerful presumption against inferring preemption of local government authority in matters of public safety and health persuade us that insufficient evidence exists of a "clear and manifest purpose" (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230) to deprive local governments of the ability to regulate the use of pesticides.

**C. The Purpose And Operation Of FIFRA Do Not Establish A Clear And Manifest Purpose To Preempt Local Regulation Of Pesticide Use**

So, too, neither the purpose nor operation of FIFRA requires federal preemption of local regulation. Properly viewed, FIFRA establishes a regulatory partnership between federal, state and local governments. Section 22(b) expressly recognizes this multi-level approach by directing the Administrator to "cooperate with \* \* \* any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this [Act], and in securing uniformity of regulations." 7 U.S.C. 136t(b). As this

(1972). Along with all of the other Commerce Committee amendments, the Commerce Committee's amendment on local government authority was presented on the Senate floor before passage of the compromise bill (118 Cong. Rec. 32,249-32,251 (1972)), but the amendments were not addressed before consideration of the compromise substitute bill, and, as specified before that consideration, the amendments were considered withdrawn after passage of the substitute (*id.* at 32,252, 32,263). See also I Pet. App. 22 (Abrahamson, J., dissenting).



provision recognizes, not all environmental problems are best addressed by exclusively federal solutions, or even by state-wide programs. Some may more appropriately be addressed by a regulatory system characterized by a set of basic federal standards that States may supplement, either by their own regulations or by local regulations adopted within the framework of appropriate state delegation.<sup>20</sup>

To be sure, an exclusively federal approach is necessary in certain areas of pesticide regulation. One such area is labeling. Due to the burden on commerce that would be imposed by different labeling requirements in States and localities across the country, Congress clearly preempted all but federal regulation of labels. See 7 U.S.C. 136v(b). With respect to the use of pesticides, however, the ability of local governments to exercise discretion in enacting specific controls can be an essential part of the overall federal/state regulatory framework. Indeed, this framework is an integral part of the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat.

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<sup>20</sup> The state supreme court cited, as support for its conclusion, an EPA statement issued in 1975. 1 Pet. App. 25-26. This reliance is misplaced. The quoted language is from the preamble to EPA's final rule regarding approval of state plans for certification of pesticide applicators. 40 Fed. Reg. 11,700 (1975). This rule pertains to a different Section of FIFRA, 7 U.S.C. 136i(a)(2), in which Congress authorized States to develop applicator certification plans; it does not pertain to state regulation of "the use" of pesticides authorized by Section 24(a). See page 13, *supra*. The purpose, scope, and specific provisions of the applicator certification plan procedure are fundamentally different from the general issue concerning local regulation of pesticide use presented by this case. To the extent that the EPA statement in the preamble is subject to a broader reading, the language could have been more precise; EPA's position is that local governments are not preempted from regulating pesticide use.

642. Those Amendments require States to develop programs to protect public wellhead areas from contaminants (which include pesticides, 42 U.S.C. 300f(6)), and to "specify the duties of State agencies, local governmental entities, and public water supply systems with respect to the development and implementation of [the] programs." See 42 U.S.C. 300h-7(a)(1). Under the ruling below, local governments could be substantially hampered in playing an appropriate role in protecting public water supply wellhead areas from pollution by pesticides. Cf. Office of Ground-Water Protection, EPA, *Protecting Ground-Water: Pesticides and Agricultural Practices* 3 (1988) (recognizing importance of local governments in addressing problem of pesticide contamination of groundwater). Where, as here, "coordinate" local, state and federal "efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *New York Dep't of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

In sum, Congress has not established with requisite clarity an intent to preempt all local government regulation, particularly in a field involving safety and health and in a context in which a local governmental role furthers the overall structure and purpose of the federal statutory program.<sup>21</sup>

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<sup>21</sup> Because there is insufficient evidence of congressional intent to preempt local regulation of pesticide use, we believe that there is no need in this case to reach the Tenth Amendment issue raised in Question 2 of the petition. We note, however, that, in contrast to cases such as *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), there is no contention here that Congress is not constitutionally empowered to prohibit *all* state and local regulation of the particular subject matter involved in this litigation. The



## CONCLUSION

The judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted.

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FEBRUARY 1991

claim, instead, is that, if Congress concludes that a multiplicity of local regulation would be incompatible with the purpose and operation of the federal program, Congress must also preclude state-wide regulation in order to achieve that result even though it believes that state-wide regulation should be permitted. Such a contention stands the Tenth Amendment on its head. We also note that many statutes involving federal expenditures require state-wide plans. See, *e.g.*, 42 U.S.C. 602(a) (1) and (3) (Aid to Families With Dependent Children); 42 U.S.C. 654(1) (child and spousal support); 42 U.S.C. 671(a) (3) (foster care and adoption assistance); 42 U.S.C. 1393(1) (aid to combat mental retardation); 42 U.S.C. 1396a(a) (1) (medical assistance). Cf. *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985) (federal statute explicitly permitting local governments to spend federal payments in lieu of taxes for any purpose preempts state statute requiring counties to spend 60% of the payments on schools). See also *South Dakota v. Dole*, 483 U.S. 203 (1987).

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OFFICE OF THE CLERK

No. 89-1905

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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TOWN OF CASEY,

*Petitioners,*

v.

RALPH MORTIER AND WISCONSIN FORESTRY/  
RIGHTS-OF-WAY/TURF COALITION,

*Respondents.*

On Writ of Certiorari to the Wisconsin Supreme Court

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**BRIEF AMICUS CURIAE OF THE  
NATIONAL INSTITUTE OF  
MUNICIPAL LAW OFFICERS  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF THE AMICUS CURIAE**

This brief amicus curiae is filed pursuant to Rule 37 of the Rules of this Court on behalf of the more than 1700 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).



NIMLO is a national organization comprised of municipalities and local government units, which are political subdivisions of states. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, and other titles. NIMLO has a compelling interest in issues that affect local governments.

The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and for the political subdivision of the state, territory, or commonwealth of which they are the authorized law officers.

The local government attorneys who operate NIMLO are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of their citizens through the regulation of matters which are of genuine local and municipal concern. These attorneys also represent their governments in litigation resulting from the enforcement of such regulations.

In this case, the Wisconsin Supreme Court determined that the Town of Casey's pesticide ordinance was preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

NIMLO believes that the Wisconsin Supreme Court erred in its application of the federal test for preemption. This error will severely curtail the ability of local governments to use their police powers to foster and protect the health, safety and welfare of their residents. NIMLO, therefore, urges the reversal of the Wisconsin Supreme Court's decision.

Consent to the filing of this brief has been granted by both parties and copies of these letters have been lodged with the Court.

### STATEMENT OF THE CASE

Amicus adopts the statement of the case and the facts as presented by Petitioners, Wisconsin Public Intervenor and Town of Casey.

### SUMMARY OF THE ARGUMENT

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) is the primary federal law regulating pesticides. The Wisconsin Supreme Court, in the present case, held that FIFRA preempts the Town of Casey's pesticide ordinance. Amicus urges this Court to reverse the Wisconsin Supreme Court and find that FIFRA does not totally preempt local government regulation of pesticides.

Amicus asserts that the Wisconsin Supreme Court erred in its application of the federal preemption test. Congressional intent to preempt areas of traditional state regulation may not be presumed. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). Local governments have a strong interest in protecting their residents from the potentially hazardous effects of pesticides. They are in the best position to guard against problems associated with pesticide use in their locality.

A congressional intent to preempt should not be inferred unless "the nature of the regulated subject matter permits no other conclusion, or [unless]... Congress has unmistakably so ordained." *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). FIFRA, by its own terms, does not require that the sale and use of pesticides be regulated exclusively by the federal government. Moreover, based on FIFRA's ambiguous legislative history, it cannot be said that "Congress has unmistakably...ordained" the preemption of local government regulation.

Preemption should not be implied where it would both "significantly interfere with 'the separate spheres of governmental authority'" and have far-reaching consequences not intended by Congress. *Massachusetts v. Morash*, 109 S.Ct. 1668, 1675 (1989) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987)). A finding that FIFRA was intended to totally preempt local government regulation of pesticides would significantly interfere with state sovereignty by preventing states from delegating their power to act in a matter concerning health, safety and welfare. The consequences of such a finding would be to eliminate local ordinances which presently serve to safeguard the ultimate consumers of pesticides. Amicus asserts that these consequences were neither intended nor envisioned by Congress.

## ARGUMENT

### FIFRA DOES NOT PREEMPT LOCAL REGULATION OF PESTICIDES.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 et. seq., is the primary federal pesticide statute. FIFRA regulates pesticide registration, labeling, storage, disposal and transportation.

The Wisconsin Supreme Court determined, in the present case, that the Town of Casey pesticide ordinance was preempted by FIFRA. The ordinance required any person seeking to apply pesticides in the Town to obtain a permit and post notices warning that an area had been treated with pesticides. Town of Casey, Washburn County, Wis., Ordinance No. 85-1 (1985). Amicus asserts that the court erred in its application of the federal preemption test.

Congressional intent to preempt requires a "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231 (1947). The same analysis is used for the preemption of local laws as is used for the preemption of state laws. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

Federal preemption analysis starts with the presumption "that Congress did not intent to pre-empt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). This presumption "provides assurance that 'the federal-state balance,' [citation omitted] will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

The regulation of pesticides has traditionally been an area of local concern.<sup>1</sup> Spraying crops and grass can have the unfortunate side

<sup>1</sup>See, e.g., *People ex. rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 1152, 204 Cal. Rptr. 897 (1984) (citing Dunning, *Pests, Poisons and the Living Law: The Control of Pesticides in California's Imperial Valley* 2 Ecology L.Q. 633, 643-44, 668 (1972).) ("Pesticide usage was not regulated by the state but was regulated solely by the counties until after World War II.")

effect of contaminating food, lakes, streams and recreation areas. Local governments clearly have a strong interest in protecting their residents from the potentially harmful effects of pesticide use and are in the best position to know the particular problems associated with pesticide use in their locality. A locality's geography, previous exposure to chemicals, groundwater hydrology and climate may determine whether a certain chemical is dangerous.<sup>2</sup> Because of these local concerns, many municipalities have enacted ordinances to protect the health, safety and welfare of their residents.<sup>3</sup>

<sup>2</sup>Boulder, Colo., Rev. Code § 6-10-1(b) (1981) ("The City Council finds that the unique wind conditions in the city cause drift to occur during airborne applications of pesticides and that absent pre-application notification, airborne applications of pesticides constitute a nuisance."); See also *County of Mendocino*, 683 P.2d at 1152, quoting from a Mendocino County, California ordinance, "We find and declare that it is necessary to prohibit aerial application of phenoxy herbicides because of the dangers of drift, contamination of food and water and irrevocable harm to natural resources. The aerial application of phenoxy herbicides, in light of said dangers, threatens the right of the people of Mendocino County to be secure in their homes and enjoy the peaceful, undisturbed use of private property and public lands."

<sup>3</sup>See, e.g., Village of Oak Park, Ill. Code ch. 20, art. 10 (1981). The Village requires pesticide applicators to provide persons, who may be affected by pesticides, with information concerning pesticides to be applied and safety precautions which may prudently be taken before, during and after a pesticide application. Applicators must also provide the name and description of the pesticides to be applied, the known risks, and appropriate safety precautions for each pesticide application. The Village determined that this will increase public knowledge concerning the safe use of pesticides, and facilitate an informed choice concerning pesticide applications. Prior notice of a pending indoor pesticide application is also required. The Village determined that this will serve to alert those persons who have the potential to be exposed to pesticides for an extended period of time as well as serve to alert those residents who have acute allergic, toxic or otherwise harmful responses to exposure to certain pesticides. See also, Minneapolis, Minn., City Charter and Code of Ordinances § 230.30 (1976) (requiring warning flags, with the name of the person or company applying the pesticide, the date of application and a warning to children and pets, posted in areas of pesticide application; flags to remain in place for forty-eight hours after pesticide application); Portland, Or., Code § 21.24.050 (1984) (requiring specific



In areas that have traditionally been of local concern, such as pesticide use, federal preemption should not be found "in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

FIFRA specifically indicates that the sale and use of pesticides is not subject to exclusive federal regulation. FIFRA expressly authorizes states to enact laws pertaining to the "sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA]." 7 U.S.C. § 136 v(a). The only areas that have been specifically preempted by FIFRA are the labeling and packaging of pesticides. 7 U.S.C. § 136 v(b).

FIFRA, by its own terms, leaves no question "that the nature of the regulated subject matter" does not require exclusive federal control. The remaining question, therefore, is whether "Congress has unmistakably...ordained" that local regulation should be preempted. The law is clear that "we are not to conclude that Congress legislated the ouster of [local regulations] . . . in the absence of an unambiguous congressional mandate to that effect." *Florida Avocado Growers*, 373 U.S. at 146-47.

authorization from Portland Bureau of Water Works prior to connecting to the public water supply for the purpose of introducing chemicals for use as pesticides); Miami, Fla., Charter and Code art.IV, § 23-63 (1980) (prohibiting the possession of "restricted pesticides" set forth in the section); Jacksonville, Fla., Municipal Code § 364.105 (1970) (prohibiting the sale or use of insecticides with sodium fluoride, live-micro-organisms, sodium fluoracetate (compound 1080), thallium sulphate or thallium salt unless certain conditions are met); St. Louis, Mo., Rev. Ordinances § 623.040 (1974) (prohibiting the sale, possession or use of a pesticide containing dichlorodiphenyl trichloroethane (DDT)); Los Angeles, Cal., Municipal Code § 41.34, 57.101.22 (1936) (requiring that prior notice be given to the tenants of multi-family dwellings of the pest to be controlled, the pesticides to be used and their active ingredients; and regulating the storage, mixing or transporting of pesticides at any airport); and Wilmette Village, Ill., Code § 5-19 (1967) (requiring a municipal license prior to spraying of pesticides, prohibiting the use of persistent compounds of chlorinated hydrocarbons, prohibiting pesticide application when true wind velocity exceeds the ten miles per hour, and requiring warning poster signs 300 feet from the place of application.)

It is not disputed that FIFRA, while specifically permitting state regulation of the sale and use of pesticides, neither expressly permits nor prohibits local government regulation. The Wisconsin Supreme Court found, however, that congressional intent to preempt local government regulation of pesticides was implied because FIFRA's definition of "state" made no reference to local government. *Mortier v. Town of Casey*, 154 Wis. 2d 18, 24, 452 N.W. 2d 555, 557 (1990). While the court conceded that this omission, by itself, was ambiguous as to congressional intent, it determined that reference to FIFRA's legislative history made it "abundantly clear" that Congress intended to deprive states of the authority to delegate their power to regulate the sale and use of pesticides. *Mortier*, 154 Wis. 2d at 24-25, 452 N.W. 2d at 557-58.

This analysis is flawed. Lower courts are in conflict as to whether FIFRA's legislative history indicates a clear congressional intent to preempt local government regulations. The state supreme courts in Maine and California have reached the conclusion that FIFRA's legislative history does not preempt states from authorizing local governments to regulate pesticides.<sup>4</sup> The United States District Court for the District of Colorado also held that FIFRA's legislative history neither authorizes nor prohibits local regulation.<sup>5</sup>

Two federal courts have found that this same history preempts local governments from regulating pesticide use.<sup>6</sup>

FIFRA's history has been successfully used to both infer congressional intent to preempt as well as to infer congressional intent to leave to the states whether to delegate their power to regulate pesticides. Amicus asserts that this history can hardly be considered "an unambiguous congressional mandate" to preempt local regulations. Local governments should not, therefore, be deprived of their power to protect their residents' health, safety and welfare.

<sup>4</sup>*Central Maine Power Co. v. Town of Lebanon, Maine*, 571 A.2d 1189 (Me. 1990) and *People ex. rel. Deukmejian v. Mendocino County*, 36 Cal. 3d 476, 683 P.2d 1150 (Cal. 1984).

<sup>5</sup>*COPARR, Ltd. v. The City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989).

<sup>6</sup>*Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3180 (U.S. Aug. 31, 1990) (No. 90-382) and *Maryland Pest Control Ass'n v. Montgomery County*, 646 F.Supp. 109 (D. Md. 1986), *aff'd without opinion*, 822 F.2d 55 (4th Cir. 1987).



Further supporting the conclusion that Congress did not intend to totally preempt local government regulation of pesticides are the effects that preemption would have on the sovereignty of state government and the consequences for the ultimate consumer of pesticides. In *Massachusetts v. Morash*, 109 S.Ct. 1668 (1989), the Court considered whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 833, as amended, 29 U.S.C. Section 1002(1), preempted state regulation of routine vacation benefits. The Court determined that the primary concern of Congress in enacting ERISA was the mismanagement of employee benefit funds. *Morash*, 109 S.Ct. at 1671. In finding against preemption, the Court said that state regulation of routine vacation benefits was not a concern of Congress in enacting ERISA and that a finding of preemption would place employees in a position of receiving less protection than under state regulations. *Id.* at 1675. According to the Court, "Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.'" *Id.* (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987)).

Amicus asserts that a finding of implied preemption will significantly interfere with state sovereignty and have far-reaching consequences not intended or envisioned by Congress. Congress enacted, and subsequently revised FIFRA to protect people and their environment from unsafe pesticides. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991-92 (1984). FIFRA, by its own terms, was only setting minimum regulations as to the sale and use of pesticides. States have historically had the authority to delegate matters of health, safety or welfare to local governments. In response to this state delegation of power, local governments have enacted ordinances to protect their residents against the inherent dangers of pesticide use. Such ordinances have required prior notice of pesticide applications, posting warning notices of pesticide use, authorization from municipal water works departments prior to introducing pesticides into the water supply, and have prohibited the possession or use of certain pesticides.<sup>7</sup> A finding

<sup>7</sup>See, e.g., ordinance listed in footnote 3.

of implied preemption would have the effect of eliminating these local ordinances thereby preventing municipal residents from taking precautions to minimize or eliminate the dangers resulting from local pesticide use. In light of the congressional concerns which led to the enactment of FIFRA, Congress cannot be said to have intended these far-reaching consequences.

FIFRA's ambiguous history coupled with the strong presumption against implied preemption inexorably leads to the conclusion that the Supreme Court of Wisconsin erred in finding that FIFRA totally preempts local government regulation of pesticides.

## CONCLUSION

For the foregoing reasons it is urged that this Court reverse the decision of the Wisconsin Supreme Court.

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*Petitioners,*

v.

RALPH MORTIER, *et al.*,  
*Respondents.*

BRIEF OF *AMICI CURIAE* VILLAGE OF MILFORD,  
MICHIGAN, MAYFIELD VILLAGE, OHIO,  
AND CITY OF BOULDER, COLORADO

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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No. 89-1905

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WISCONSIN PUBLIC INTERVENOR, *et al.*,  
*Petitioners,*

v.

RALPH MORTIER, *et al.*,  
*Respondents.*

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On Writ Of Certiorari To  
The Supreme Court Of Wisconsin

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BRIEF OF *AMICI CURIAE* VILLAGE OF MILFORD,  
MICHIGAN, MAYFIELD VILLAGE, OHIO,  
AND CITY OF BOULDER, COLORADO

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The Village of Milford, Michigan, Mayfield Village, Ohio, and the City of Boulder, Colorado, file this brief as *amici curiae* to urge the Court to reverse the judgment of the Supreme Court of Wisconsin and to hold that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") does not preempt all local authority to regulate pesticides. Alternatively, if the Court finds that FIFRA does preempt some aspects of local pesticide regulation, *amici* urge the Court to limit its holding to those local regulatory schemes that revisit determinations that have been made by the federal govern-

ment under FIFRA, thereby preserving local authority to regulate other aspects of pesticide use that are untouched by federal regulation.

### INTEREST OF *AMICI CURIAE*

The three *amici* municipalities are filing this brief because each of them has a local pesticide ordinance that has been challenged on federal preemption grounds similar to those raised in this case. However, *amici*'s ordinances differ from the ordinance at issue here in one important respect: none of them seeks to prevent the use of an approved pesticide. Instead, as the descriptions below indicate, they deal principally with assuring adequate public notice of pesticide use and with other matters not regulated by the federal government under FIFRA. They also represent the range of local concerns over pesticides, aside from those dealt with by the Town of Casey ordinance, that are not currently being addressed by federal authorities and that will remain wholly unregulated if the broad view of preemption urged by the respondents prevails.

In 1986, the Village of Milford adopted an ordinance that requires commercial pesticide applicators to inform the Village of the chemical pesticides used in the Village, to pay an annual \$15 fee, and to notify the public of pesticide applications in the Village. Village of Milford Ordinance No. 197 (1986) ("Comp." 79).<sup>1</sup> In an action brought by the Professional Lawn Care Association, a group of businesses that provide commercial lawn care services, the district court set aside the Ordinance on the ground that FIFRA preempts all

<sup>1</sup>Where they are not fully set forth in published decisions, the local ordinances discussed in this brief are being lodged with the Court in a separate statutory compilation ("Comp.").

local authority to control any aspect of pesticide use. *Professional Lawn Care Association v. Village of Milford*, No. 89-CV-71439-DT (E.D. Mich. Sept. 15, 1989). The Sixth Circuit affirmed, holding that FIFRA precludes all local pesticide regulation, including local notification schemes. *Professional Lawn Care Association v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990). On August 31, 1990, the Village of Milford filed a petition for a writ of certiorari, which is still pending. No. 90-382.

In 1987 and 1988, Mayfield Village adopted two ordinances that require all pesticide users to give notice to abutting property owners before pesticides are applied in the municipality. Mayfield Village Code Chapter 763 (Comp. 85). The Professional Lawn Care Association has challenged these ordinances on federal preemption grounds, but the district court has not ruled in the case. *Professional Lawn Care Association v. Mayfield Village, Ohio*, No. 1:89 CV 0867 (N.D. Ohio filed May 8, 1989).

In 1987 and 1988, the City of Boulder, Colorado, enacted two ordinances concerning pesticide use in the City. Ordinance No. 5129 requires pesticide users, excluding commercial applicators, but including those who contract with them for pesticide services, to give prior notice of airborne sprayings to those on adjacent properties, to provide advance notice of indoor pesticide applications to tenants and employees of nonmanufacturing businesses, and to post notices on properties, including lakes and other open bodies of water, where outdoor pesticides have been applied. Comp. 9. Ordinance No. 5083 required commercial pesticide users to provide the City with copies of records of pesticide applications that must be maintained under state law. In addition, all pesticide users, both commercial and non-commercial, were required to (1) report spills or misapplications to the



City Manager and affected property owners and tenants; (2) refrain from transporting, storing, disposing of, or using pesticides in ways that cause injuries or contamination of surface or ground water; (3) refrain from filling tanks used for pesticide applications without a prescribed spacing between the water supply and the tank; (4) use an anti-siphon device for any pesticide application method that connects to the City water system; and (5) refrain from disposing of pesticides into any City sewer, storm sewer, ditch, or lake. Comp. 1. Ordinance No. 5083 also provided for local enforcement of FIFRA's requirements. Comp. 8.

An association of commercial pesticide applicators challenged the Boulder Ordinances on federal preemption grounds. In *COPARR, Ltd. v. City of Boulder*, 735 F.Supp. 363 (D. Colo. 1989), the court held that FIFRA does not automatically preempt all local pesticide regulation. Accordingly, the district court upheld the local notification requirements of Ordinance No. 5129. However, because the court concluded that local enforcement of federal standards conflicted with FIFRA, it struck down Ordinance No. 5083 on conflict preemption grounds.

Rather than appeal the ruling with respect to Ordinance No. 5083, the City of Boulder re-enacted Ordinance No. 5083 without the provision providing for local enforcement of FIFRA. Ordinance No. 5250 (Nov. 14, 1989) (Comp. 16); Ordinance No. 5266 (Jan. 23, 1990) (Comp. 29). The repeal of the enforcement provision rendered moot the issue of whether FIFRA preempted local enforcement of FIFRA's provisions. However, the pesticide applicators appealed the district court ruling with respect to the public notification ordinance. After hearing oral argument, the Tenth Circuit held that appeal in abeyance pending the outcome of this case. No. 89-1341 (10th Cir. Jan. 16, 1991).

The *amici* municipalities have an interest in this case because the Court's decision will establish the principles that will determine the viability of their pesticide ordinances. If the Court determines that FIFRA leaves all local authority intact, as we argue in Point I, that ruling will apply equally to the Milford, Mayfield Village, and Boulder Ordinances. However, if the Court decides that FIFRA preempts the Town of Casey Ordinance, we argue in Point II that the ruling should extend only to local laws that revisit federal regulation, in which case the Milford, Mayfield Village, and Boulder Ordinances would survive. Because the viability of their ordinances would be jeopardized by a blanket preemption ruling, *amici* file this brief to urge the Court to restrict any preemption ruling to local regulations that directly conflict with federal regulation.

## STATEMENT OF THE CASE

Under the tripartite scheme of pesticide regulation in the United States, federal, state, and local governments share responsibility for controlling pesticide use. As the brief of the United States as *amicus curiae* states, "FIFRA establishes a regulatory partnership between federal, state and local governments." U.S. *Amicus Br.* on Petition for Writ of Certiorari, at 13 ("U.S. Br."). In order to understand how the combined efforts of these three regulatory authorities lead to a workable regulatory scheme, it is necessary to review the regulatory initiatives at each level.

### A. Federal Pesticide Regulation.

The federal role in pesticide regulation is dictated largely by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.* - Congress originally enacted FIFRA in 1947 as a labelling statute designed to

eliminate unwarranted manufacturer claims and to require warning statements on product labels to prevent injury to applicators and harm to crops. U.S. General Accounting Office, *Nonagricultural Pesticides: Risks and Regulation* 9 (1986); C. Bosso, *Pesticides & Politics: The Life Cycle of a Public Issue* 53-54 (1987). While FIFRA protected the farmer from adulterated and ineffectual products, it did not require the federal government to protect the public from adverse health or environmental effects of pesticides. C. Bosso, *supra*, at 58.

In 1972, Congress amended FIFRA to take into account an increasing body of scientific evidence indicating that pesticide use poses risks to human health and the environment. See Pub. L. No. 92-516, 86 Stat. 996 (1972); H.R. Rep. No. 511, 92d Cong., 1st Sess. 4 (1971). As amended, FIFRA requires the Environmental Protection Agency ("EPA") to determine which pesticides can be safely used and for which purposes. 7 U.S.C. § 136a(c).

Under this scheme, EPA decides whether to register and how to classify a particular pesticide use, based on its review of the scientific evidence of the pesticide's safety and impact on health and the environment. *Id.* § 136a. If EPA determines that a pesticide use will have an adverse effect on human health or the environment that outweighs its benefits, EPA may prohibit that use. *Id.* §§ 136a(c)(5)(C), 136a(c)(6), 136d(b) and 136(bb). Alternatively, EPA may classify a pesticide as a "restricted use" pesticide because its unrestricted application will have unreasonable adverse effects on human health or the environment. *Id.* § 136a(d)(1)(C). Restricted use pesticides may be applied only by certified applicators, or those working under their direct supervision, and may be subjected to additional restrictions. *Id.*

The 1972 amendments also require EPA to review pesticides that were already on the market for adverse health and environmental effects. However, EPA has encountered numerous delays. For example, as of 1986, it had reregistered none of the 50,000 pesticides subject to reregistration and had completed its review of none of the 600 pre-1972 active pesticide ingredients. General Accounting Office, *Pesticides: EPA's Formidable Task to Assess and Regulate Their Risks* 3 (1986). In order to accelerate the process, Congress amended FIFRA in 1988 to set deadlines for EPA's data collection and its reregistration of existing pesticides, but even under the 1988 standards, it will be at least the mid-1990's before EPA completes the reregistration process. See 7 U.S.C. § 136b.

Pesticide labels play an important role under FIFRA since pesticides may not be used in ways that deviate from the instructions on their labels. 7 U.S.C. § 136j(a)(2)(G). The pesticide label contains information designed to protect pesticide purchasers against fraudulent claims concerning a pesticide's composition, as well as instructions to ensure proper application of the pesticide. See *id.* § 136(p); 40 C.F.R. § 156.10. To ensure that manufacturers are subject to one label requirement for pesticides that may be sold throughout the United States, FIFRA preempts state labelling authority in section 24(b), which provides that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." 7 U.S.C. § 136v(b).

FIFRA is far less pervasive in other areas of pesticide regulation besides registration and labelling. Thus, FIFRA does not direct EPA to require public notice of pesticide use or its hazards, and EPA has not entered this field on its own. The labels, which are attached to the pesticide container, provide information about the pesticide and its hazards to the



purchaser and often to the applicator, but not to members of the public who will come into contact with the pesticide once it is applied. See 7 U.S.C. § 136a(d)(1)(C); 40 C.F.R. § 152.175; *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989).

In addition, while EPA decides whether a pesticide may be marketed, and, if so, for which uses, it does not consider the possible effects of that pesticide use on groundwater contamination in making its determinations. See McCabe, *Pesticide Law Enforcement: A View from the States*, 4 J. Env't L. & Litigation, at 35, 42 & nn. 23 & 24, 43 & n.26 (1989). Moreover, other statutes, such as the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642, prescribe an active local role in protecting wellhead areas, drinking water and public water systems, and sole source aquifers from pesticide contamination. 42 U.S.C. §§ 300f(6), 300g-3(e), 300h-6(c) & 300h-7(a)(1).

#### B. State Pesticide Regulation.

FIFRA envisions an active state role in the regulation of pesticides. Thus, FIFRA allows states to assume primary enforcement of pesticide use violations, to conduct inspections, and to certify pesticide applicators. 7 U.S.C. §§ 136f(b), 136g(a), 136i(a)(2), 136w-1. The states are not limited to enforcement of federal law or to implementation of federal certification standards. Instead, FIFRA expressly authorizes additional state pesticide regulation, provided that the state does not undercut federal restrictions on the sale or use of pesticides:

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and

to the extent the regulation does not permit any sale or use prohibited by this Act.

7 U.S.C. § 136v(a). A state may also register certain pesticides for experimental uses or for additional uses to meet special local needs, as long as the EPA has not previously denied, disapproved, or cancelled that particular use. *Id.* §§ 136c(f), 136v(c)(1).

Under this partnership scheme, states have banned the use of federally approved pesticides and have imposed restrictions on pesticides that EPA allows to be used without restrictions. For example, the States of Massachusetts and Wisconsin imposed restrictions on the use of daminozide on apples after EPA determined that it was a carcinogen, but before EPA took action to restrict its use. See Mass. Ann. Laws ch. 94, § 192 (1991); Wis. Stat. § 94.707(1m) (1989). Similarly, states have banned or restricted the use of other pesticides that EPA had permitted to be used. See, e.g., Iowa Code Ann. § 206.32 (1989) (chlordane); Md. Agric. Code Ann. § 5-210.5 (1989) (chlordane, heptachlor, aldrin and dieldrin); Minn. Stat. § 18B.115 (1990) (chlordane and heptachlor); Wis. Stat. § 94.707(a)-(b) (1987-1988) (2-4-5 trichlorophenoxyacetic acid and silvex).

Other state laws fill voids in federal pesticide regulation. Many such laws deal with public notification of pesticide use and its hazards. See, e.g., Colo. Rev. Stat. § 35-10-112 (1990); Conn. Gen. Stat. Ann. § 22a-66a (1989); Fla. Stat. § 482.2265 (1989); Iowa Code Ann. § 206.19(3), (3A) & (4) (1989); Md. Agric. Code Ann. § 5-208 (1989); see also McCabe, *supra*, at 48 n.50. Similarly, a California voter initiative requires warnings on all products containing carcinogens and reproductive toxins, including products with pesticide residues that have such effects. California's Safe Drinking Water and Toxic En-



forcement Act of 1986, Cal. Health & Safety Code §§ 25249.5-25249.13; *see D-Con v. Allenby*, 728 F. Supp. 605 (N.D. Cal. 1989) (upheld against FIFRA preemption challenge). In addition, the State of Maine requires that grocery stores post signs informing consumers of the pesticides that are applied on produce after harvest. Me. Rev. Stat. Ann. tit. 22, § 2157(14) (1989).

These additional state laws nonetheless leave large areas of pesticide regulation untouched by federal or state law. *See McCabe, supra*, at 8. Moreover, some states encourage further local pesticide regulation, *see* Iowa Code Ann. § 206.19(3) (1989) (provides role for municipalities in establishing public notification rules, determining schedules for pesticide applications to minimize harm to people and animals, and reporting infractions and implementation); La. Admin. Code § 12.4 (1989) (allows local notice requirements for certain aerial applications), and others clearly do not preempt such local supplementation. *See, e.g.,* Colo. Rev. Stat. § 35-10-112(3) (1990) (municipalities may impose notification requirements on private individuals, property owners and the general public); La. Rev. Stat. Ann. § 3:3225 (1989) (procedure for establishing local requirements for the sale or application of pesticides).

### C. Local Pesticide Regulation.

Local governments have entered the field of pesticide regulation to fill gaps in the federal-state regulatory scheme and to address particular health problems suffered by their residents. As the *amicus curiae* brief of the United States recognizes, "a local governmental role furthers the overall structure and purpose of the federal statutory program." U.S. Br. at 15.

FIFRA does not expressly preempt local authority to regulate pesticides. On the contrary, several FIFRA provisions invite local pesticide regulation. Thus, section 22 requires EPA to "cooperate with . . . any appropriate agency of any State or any political subdivisions thereof, in carrying out the provisions of this Act, and in securing uniformity of regulations." 7 U.S.C. § 136t(b); *accord id.* § 136r(b) (requires cooperation with local agencies in formulating and revising national monitoring plan); *id.* § 136r(c) (requires cooperation with local agencies in monitoring activities). Similarly, political subdivisions may inspect the records of pesticide manufacturers and sellers for enforcement purposes, *id.* § 136f(b), which indicates that FIFRA authorizes political subdivisions to conduct at least some enforcement activities. *See* U.S. Br. at 9; *but see COPARR, Ltd. v. City of Boulder*, 735 F. Supp. at 367 (striking down ordinance which permitted the City to enforce FIFRA). In addition, pesticide producers and distributors must notify local officials of the quantities and locations of pesticides whose registrations have been cancelled or suspended. 7 U.S.C. § 136d(g)(1). Moreover, other federal laws that have an impact on pesticide use mandate a local role in the regulatory scheme. For example, the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642, prescribe an active local role in protecting wellhead areas, sole source aquifers, and drinking water from pesticide contamination. 42 U.S.C. §§ 300f(6), 300g-3(e), 300h-6(c) & 300h-7(a)(1).

The range of local pesticide laws under this tripartite system is vast. Some local laws, like the Town of Casey Ordinance, enable the local government to restrict certain uses of federally registered pesticides. Thus, the Casey Ordinance requires commercial pesticide users to obtain a local permit before all aerial sprayings of pesticides and before applications of pesticides by any means on public

lands. Town of Casey Ordinance No. 85-1, § 1.2 (App. C to Petition for Writ of Certiorari, at 6).

Similarly, in 1971, the Town of Huntington, New York, established a pesticide control board that had the authority to restrict or forbid the use of pesticides within the Town. *Long Island Pest Control Ass'n, Inc. v. Town of Huntington*, 341 N.Y.S.2d 93, 72 Misc. 2d 1031 (1973), *aff'd without opinion*, 351 N.Y.S.2d 945, 43 A.D.2d 1020 (1974) (struck down on state preemption grounds). The Town of Wendell, Massachusetts, likewise required pesticide users to submit to a hearing before a pesticide application, after which the Town could impose restrictions on the use of the pesticide. *Town of Wendell v. Attorney General*, 394 Mass. 518, 476 N.E.2d 585 (1985) (struck down on state preemption grounds, although court indicated that some local laws would have survived). In addition, the Town of Lebanon, Maine, has an ordinance that requires a town meeting vote before pesticides can be sprayed for non-agricultural uses within the Town. *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990) (upheld against federal preemption challenge).

In some cases, local governments impose these limitations in their proprietary capacity. Thus, the Village of Franklin Park, Illinois, prohibits the use of chemical substances on trees and shrubs located on publicly owned property or public rights-of-way without the prior written permission of the Commissioner of Public Works, who determines whether the pesticide will adversely affect vegetation, the health and safety of area residents, or the environment. Village of Franklin Park Ordinance No. 8889 MC 29 (1989)(Comp. 41); *see also* Town of Newburgh, Maine Ordinance (1980) (Comp. 72) (prohibiting certain pesticide uses on rights-of-way); Town of Limerick, Maine Ordinance (1988) (same) (Comp. 70). Similarly, the Casey Ordinance requires

permits for pesticide applications on public lands, Casey Ordinance No. 85-1, § 1.2 (1985)(App. C to Petition for Writ of Certiorari, at 6), and the Milford Ordinance mandates postings of pesticide applications in public buildings. Milford Ordinance, § 4 (Comp. 81-82). Some local governments, such as Montgomery County, Maryland, have likewise adopted laws requiring the use of alternatives to toxic pesticides on County property. *See, e.g.*, Montgomery County, Maryland, Resolution No. 11-1859 (1990)(Comp. 76).

Other local restrictions on pesticide use seek to protect the interests of its residents, much in the way that trespass, nuisance, and zoning laws do. Thus, the Town of Salisbury, New Hampshire, adopted an ordinance that prohibited the use of chemical defoliant by individuals other than the owner or those acting with the owner's written consent. *Town of Salisbury v. New England Power Co.*, 121 N.H. 983, 437 A. 2d 281 (1981) (struck down on state preemption grounds). In addition, that ordinance prohibited such pesticide applications altogether, if they destroyed any vegetation that prevents erosion or that produces a useful crop, unless the applicator replaced the vegetation. *Id.*

Another area of repeated local concern is aerial pesticide applications. In 1977, the drift from phenoxy herbicides spread nearly three miles to cover school buses in Mendocino County, California. The public outcry led the Mendocino County voters to approve an initiative banning aerial spraying of certain pesticides, which was subsequently upheld by the California Supreme Court in the face of state and federal preemption challenges. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984) (en banc). The City of Boulder requires prior notice of airborne sprayings to those on adjacent properties because the city council found "that the unique wind condi-



tions in the city cause drift to occur during airborne applications of pesticides and that absent pre-application notification, airborne applications of pesticides constitute a nuisance." Boulder Ordinance No. 5250, § 6-10-1(b) (Comp. 17). The Town of Casey also found that "aerial spraying of pesticides increases the risk of injury or damage to persons, property and the environment, due to the increased likelihood of pesticide drift and pesticide overspray." (App. C to Petition for Certiorari, at 2-3). Out of a similar concern for the adverse effects of drift, the Village of Wauconda, Illinois, required prior notice to abutting neighbors of fogging pesticide applications, and it prohibited pesticide applications when the wind velocity exceeded ten miles per hour. Wauconda Ordinance §§ 7-12-4, 7-12-5(C) (Comp. 58, 63-64, 65-66); *Pesticide Public Policy Foundation v. Village of Wauconda, Illinois*, 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd without opinion*, 826 F.2d 1068 (7th Cir. 1987) (struck down Wauconda Ordinance on state preemption grounds because Village was not home rule jurisdiction); see also *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990) (town meeting approval required for certain herbicide sprayings); *Ames v. Smoot*, 471 N.Y.S. 2d 128, 98 A.D.2d 216 (1983) (local law making aerial spraying of pesticides disorderly conduct preempted by state law); Town of New Sweden, Maine, Art. 37 (1990) (Comp. 72) (ban on aerial spraying); Town of Wellington, Maine, Art. 12 (1988) (Comp. 75) (same); Town of Lebanon, Maine Ordinance (1980) (Comp. 69) (same); Town of Rangeley, Maine Ordinance (1989) (Comp. 73) (requiring drift management plan and notification of neighbors for certain aerial applications and banning spraying in specified area); Town of Limerick, Maine Trafton Lake Ordinance (1970) (Comp. 70) (banning certain aerial spraying).

Local governments have been most concerned about

public notification of pesticide applications. Many local governments have adopted laws that require pesticide users to convey information to the public about the pesticide's application and its hazards. Such requirements have been imposed because the federally approved labels that are affixed to the containers do not inform members of the public that an area has been sprayed or that a particular pesticide is hazardous.

Local notification laws take several forms. First, some require commercial pesticide applicators to provide information to the individuals who hire them to apply pesticides. See, e.g., City of Aurora, Illinois, Ordinance No. 090-59, § 21-33 (1990) (Comp. 32); Oak Park, Illinois, Village Code, § 20-10-3 (1989) (Comp. 44); Montgomery County Code, § 33B-2 (1986); Prince George's County Code, § 12-161.4 (1985).<sup>2</sup> In some of these cases, the laws impose obligations on individuals who contract with commercial applicators for pesticide applications to provide further notification of the applications to the public. Boulder Ordinance No. 5129 (Comp. 9, 16).

Second, many local laws require that the pesticide applicators notify neighbors of pesticide applications, while others extend such notice to individuals with particular pesticide sensitivities. Mayfield Village Code ch. 763 (Comp. 78) (notice to neighbors); Boulder Ordinance No. 5129, § 6-10-11 (Comp. 10, 24) (notice to neighbors of airborne sprayings); Wauconda Ordinance, § 7-12-5(C) (Comp. 65-66) (notice to

<sup>2</sup>The Montgomery County and Prince George County Ordinances are discussed in *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 646 F. Supp. 109 (D. Md. 1986), *aff'd without published opinion*, 822 F.2d 55 (4th Cir. 1987), which invalidated them on federal preemption grounds.



neighbors of fogging applications); Aurora Ordinance No. 090-59, § 21-33(e) (Comp. 37) (notice to neighbors); Town of Rangeley Ordinance (1988) (Comp. 74) (notice to landowners within 500 feet of the perimeter of certain treated areas); Milford Ordinance, § 5(A) (Comp. 82) (notice to individuals who are medically certified as being chemically sensitive to pesticides).

Third, numerous local laws mandate the posting of public notices in areas where pesticides have been applied. Most of these laws apply only to outdoor pesticide applications, Boulder Ordinance No. 5129 (Comp. 9, 24-28); Village of Schaumburg Ordinance No. 2952, § 16-8.1 (1988) (Comp. 56); Montgomery County Code, ch. 33B-3; Prince George's County Code, § 12-161.3, but some also require public notification to the general public of indoor applications in public or commercial buildings. *See, e.g.,* Wauconda Ordinance, § 7-12-5(A) (Comp. 64); Milford Ordinance, §§ 4, 5(B) (Comp. 81-82). Others mandate that notice be given to residents of multiple-unit residential structures, Boulder Ordinance No. 5083, § 6-11-7(a) (Comp. 7, 22-23); Aurora Ordinance, § 21-34(b) (Comp. 38); Oak Park Ordinance, § 20-10-4(B) (Comp. 49), or to employees of nonmanufacturing establishments. Boulder Ordinance No. 5083, § 6-11-7(b) (Comp. 7, 23).

Many of the local laws also require commercial pesticide applicators to pay a nominal fee in order to do business in the jurisdiction and to supply the locality with information about pesticide applications. Thus, the Milford Ordinance calls for an annual licensing fee of \$15 and directs commercial pesticide applicators to supply the Village with the names and chemical ingredients of pesticides used in the Village to enable Milford to prepare for, and to inform its residents of, any potential risks presented by the pesticide applications. Milford Ordinance, § 3 (Comp. 81); *accord* Wauconda Ordinance,

§§ 7-12-2 & 7-12-3 (Comp. 63). State or federal law generally requires that such records be maintained, and some of the local laws simply require that copies be submitted to the locality. *See* Boulder Ordinance No. 5083, § 6-11-4 (Comp. 5, 20-21, 30); Aurora Ordinance, § 21-33 (Comp. 36-37); Oak Park Ordinance, § 20-10-3 (Comp. 48). In other instances, the local law mandates additional recordkeeping of pesticide applications in order to assist the locality in undertaking corrective measures. *See* Boulder Ordinance No. 5083, § 6-11-5 (Comp. 5-6, 21, 30-31) (spills and misapplications must be reported to the City Manager and to affected property owners and tenants). Neither the notice nor the recordkeeping requirements described above prohibit or restrict the use of any federally approved pesticides or otherwise second-guess determinations made by the EPA or state regulators. Rather, they supplement federal and state regulation by requiring pesticide users to give local governments and local residents important information that they need to protect themselves from the hazards of pesticide applications.

Finally, some local governments have adopted laws that regulate pesticide use in order to protect their water supplies. Thus, the City of Boulder prohibits the disposal of pesticides into city sewers, ditches, and lakes, as well as storage, transport, or disposal practices that contaminate surface or ground water. Boulder Ordinance No. 5083, § 6-11-6(a), (b), (e) (Comp. 6, 21-22, 31). Moreover, the City of Boulder requires the use of an anti-syphon device whenever a pesticide application requires a connection to the city water system, and it has established a minimum distance between any such connection and the pesticides. *Id.* § 6-11-6(c)-(d) (Comp. 6, 21-22). Similarly, the Village of Schaumburg prohibits vehicles carrying chemical spraying materials from using fire hydrant water to fill their tanks and from flushing, dumping, or

disposing of any pesticide residue in Village sanitary sewers, storm sewers, or ditches. Schaumburg Ordinance, § 16-8.3 (Comp. 57); *accord* Wauconda Ordinance, § 7-12-6 (Comp. 67). These laws also do not revisit or conflict with federal regulation under FIFRA since that statute does not deal with surface or ground water contamination, and EPA does not take such contamination into account in its registration decisions. *See McCabe, supra*, at 41-42 & n.23.

### SUMMARY OF ARGUMENT

FIFRA has not stripped local governments of all authority to regulate matters related to pesticide use. Instead, it "establishes a regulatory partnership between federal, state and local governments." U.S. Br. at 3. Thus, FIFRA's anti-preemption provision, which expressly permits more stringent *state* regulation, negates any inference that Congress intended to leave no room for supplementation by other jurisdictions. In addition, while there is some evidence that Congress entertained the notion of preempting local authority, there is no evidence in the statute or its legislative history that Congress arrived at a final decision to do so. Moreover, preemption of local authority is inappropriate because, as the United States puts it, local regulation "furtheres the overall structure and purpose of the federal statutory program." U.S. Br. at 15.

Alternatively, even if there is preemption of *some* local authority, there is no basis for finding preemption of *all* local authority. Rather, any preemption must be limited to those matters that are actually regulated by the federal government because the concerns expressed by the relevant congressional committees favored preemption only of such matters. Thus, those congressional committees sought to avoid local duplication of federal standards and local determinations

that require complex scientific expertise that local governments rarely possess. Since these concerns come into play with local laws that revisit federal registration determinations, but not with those that deal with matters that are left untouched by federal regulators, at most they support only limited preemption of local authority.

### ARGUMENT

#### I. FIFRA DOES NOT PREEMPT LOCAL AUTHORITY.

This Court has refused to find preemption in the absence of "an unambiguous congressional mandate to that effect," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963), particularly where, as here, the federal scheme would supplant state or local health and safety regulation. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (historic police powers are not superseded by federal law "unless that was the clear and manifest purpose of Congress"). There is no such clear intent here, let alone one that extends to all local control over pesticides.

As the district court and the concurrence in the court of appeals in the *Milford* case recognized, this issue presents "a very close question," the proper resolution of which is "by no means free of doubt." *Village of Milford*, No. 90-382, Petition for Writ of Certiorari, App. 26a, 28a; 909 F.2d at 935, 941. Thus, it is not surprising that the six courts that have addressed the issue have split evenly on the result. *Compare Central Maine Power Co., COPARR, Ltd.*, and *County of Mendocino*, with *Milford*, *Mortier*, and *Maryland Pest Control Ass'n*. These conflicting results underscore that Congress failed to evince an unmistakable and unambiguous congressional intent to preempt local authority to regulate pesticides.



FIFRA does not expressly preempt local authority because it contains no explicit restrictions on the authority of local governments to regulate pesticides. Indeed, the only express preemption provision in FIFRA is limited to labelling authority. 7 U.S.C. § 136v(b). Since Congress adopted an express preemption provision, but confined it to labelling authority, the Court should not imply any greater preemption than that prescribed by Congress when it directly considered the issue of preemption, unless it is impossible in a particular case to comply with both the federal and the local requirement.

Congress further underscored its intent to give FIFRA only a limited preemptive effect in the statute's "anti-preemption" provision, which expressly authorizes supplemental state regulation. 7 U.S.C. § 136v(a). While this provision does not speak directly to local authority, it shows that Congress did not intend the federal government to occupy the field of pesticide regulation completely and that supplemental regulation would further, rather than undermine, federal interests. Because of this provision, a state could pass any of the ordinances adopted by the *amici* municipalities, and thus the only question is whether Congress disabled the municipalities from also dealing with these issues.<sup>3</sup>

The anti-preemption provision serves two related purposes. First, it makes it clear that Congress did not intend to occupy the field or to forbid state requirements that are stricter than EPA's, thereby negating any possible argument that Congress intended to preempt state authority in this

<sup>3</sup>Because section 136v(a) authorizes rather than preempts supplemental state regulation, FIFRA's failure to include local governments within its definition of "state" does not answer the question before the Court.

area. *National Agricultural Chemicals Association v. Rominger*, 500 F. Supp. 465, 469 (E.D. Calif. 1980); *County of Mendocino*, 36 Cal.3d at 491; accord *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 281-82 (1979) (plurality opinion); *id.* at 295-96 (Scalia, J., concurring). Second, section 136v(a) limits EPA's power to adopt regulations that preempt states from supplementing federal pesticide regulation, which EPA would otherwise have the power to do. See *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). Since local governments are not the direct beneficiaries of the anti-preemption provision, it does not answer the question of whether some local authority may be preempted by implication.

Implied preemption can arise in three circumstances: (1) where the federal scheme is so pervasive that it leaves no room for supplementation; (2) where the local regulation stands as an obstacle to accomplishment of the federal purposes; or (3) where there is a conflict between a particular local and federal regulation. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). The first basis is inapplicable because FIFRA does not completely occupy the field of pesticide regulation but instead leaves much to the states and specifically invites a local role in a number of areas. See *supra* at 7-8, 10-11. The second basis is also unavailing because local regulation poses no serious obstacle to the accomplishment of FIFRA's purposes. Indeed, the United States takes the position that "a local governmental role furthers the overall structure and purpose of the federal statutory program." U.S. Br. at 16. Finally, it is inappropriate to issue an across-the-board preemption ruling on the basis of conflict preemption. Rather, the Court should determine whether a specific local provision makes compliance with the federal requirement impossible



by reviewing the particular conflict, especially where, as here, the statute tolerates a great deal of conflict by expressly allowing more stringent state regulation. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 486 (1990).

Instead of relying on one of the traditional bases for implied preemption, the supporters of broad preemption argue that the Court should infer a congressional intent to preempt all local pesticide ordinances from the debates leading to the passage of the 1972 FIFRA amendments. However, the only evidence of a such an intent is found in a few statements favoring preemption that represent no more than one side of a congressional debate that was never definitively resolved one way or the other.

The bill passed by the House, where those amendments originated, would have authorized supplemental state regulation of restricted but not general use pesticides. H.R. 10729, § 24(a), *in* H.R. Rep. No. 511, 92d Cong., 1st Sess. 64 (1971). The report of the House Committee on Agriculture describes why the Committee rejected a variation of this authorization provision:

The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions.

H.R. Rep. No. 511, *supra*, at 16.

After the House passed the bill, the Senate Committee on Agriculture and Forestry agreed that local governments should not supplement state and federal pesticide regulation. S. Rep. No. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972

U.S. Code Cong. & Admin. News 3993, 4008. In addition to endorsing the reasons given by the House Committee, the Senate Committee also emphasized that "few, if any, local authorities whether towns, counties, villages or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments." *Id.* The Committee also suggested that local regulation would impose undue burdens on interstate commerce, but it never explained the nature of such burdens or how this rationale differs from those previously mentioned. *Id.*

The Senate Committee on Commerce, which also had jurisdiction over the bill, proposed numerous amendments, including one that would have expressly permitted local governments to regulate the sale and use of pesticides. S. Rep. No. 838, *supra*, 1972 U.S. Code Cong. & Admin. News 4023, 4026. Adhering to its original position, the Senate Agriculture Committee rejected this amendment and reported its version of the bill. *Id.* at 3993, 4029.

Objecting vigorously to the Agriculture Committee's bill, Members of the Commerce Committee threatened a floor fight. In order to avert such a battle, the Chairman of the Agriculture Committee re-referred the bill to the Commerce Committee for its consideration. 1972 U.S. Code Cong. & Admin. News 4027-29, 4086-88; *see generally* C. Bosso, *supra*, at 171. After holding hearings, the Commerce Committee reported the bill with a series of amendments, including one that would have expressly permitted local governments to exercise regulatory authority over pesticides. S. Rep. No. 970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4092, 4111-12. The Agriculture Committee then issued a supplemental report laying out its opposition to the Commerce Committee's amendments,

including the one authorizing local regulation. S. Rep. No. 838, *supra*, 1972 U.S. Code Cong. & Admin. News 4023, 4026, 4066. In order to resolve the major differences between the two bills, the two subcommittee chairmen spent two months ironing them out. *Id.* at 4086-88; C. Bosso, *supra*, at 171-72.

These negotiations produced a compromise bill that expressly resolved many of the disputes, but not the one pertaining to local authority. On this matter, the explanation of the compromise stated only that "Commerce Committee amendment . . . 10 (authority of local governments to regulate the use of pesticides) . . . [is] not included in the substitute." 1972 U.S. Code Cong. & Admin. News at 4089, 4091. The explanation did not adopt the gloss placed on the anti-preemption provision by the Agriculture Committee's report language, which would have excluded local authority. Nor did it endorse the Commerce Committee's desire to continue such authority.

Thereafter, the full Senate considered the measure. During the course of the Senate's deliberations, Senator Allen, the chairman of the pertinent subcommittee of the Agriculture Committee, inserted the joint explanation of the compromise bill and the Agriculture Committee's initial report into the Congressional Record. 118 Cong. Rec. 32,252, 32,256, 32,257-58 (1972). While the Agriculture Committee's report contained the committee's views on preemption of local authority, Senator Allen did not highlight this discussion in any way. The Senate then voted on the bill without any discussion of the content of these reports or the effect of the compromise bill on the authority of local governments. *Id.* at 32,263. Since there was no local preemption language in the bills adopted by either the House or the Senate, the House-Senate conference made no statement regarding the effect of the bill on local authority. H. Conf. Rep. No. 1540, 92d Cong.,

2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4130.

It is impossible to glean any single congressional intent from this legislative history, much less one that is clear, manifest, and unambiguous, as is required for a finding of implied preemption. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 146-47. To the contrary, the public record demonstrates that Congress did not definitively resolve the dispute over whether to authorize or preempt local regulation of pesticides. In other words, the two Senate committees agreed to disagree, leaving the matter up in the air. There can be little question that "[c]ommittee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J. concurring) (citations omitted). Therefore, neither the statute itself nor its legislative history evinces a clear enough intent to warrant a finding of preemption of all local authority.

## II. ANY EVIDENCE OF A CONGRESSIONAL INTENT TO PREEMPT LOCAL AUTHORITY EXTENDS ONLY TO MATTERS THAT ARE ACTUALLY REGULATED BY THE FEDERAL GOVERNMENT.

Not only is the evidence of a congressional intent to preempt local authority far too meager to support such a finding, but, even if it were clearer, it would not support a finding that *all* local pesticide regulation is preempted. Instead, what congressional intent exists supports preemption of only those matters that are actually regulated by EPA under FIFRA.



In deciding whether a particular field has been fully occupied by the federal scheme, this Court has carefully analyzed the extent of federal regulation and the reasons why Congress favored excluding states or localities from the field. Based on this analysis of the statute and its purpose, the Court has narrowly defined the preempted field, and struck down only those regulations that undermine the federal scheme. See, e.g., *Hillsborough County*, 471 U.S. at 717-18 (the mere existence of comprehensive federal regulation does not automatically preempt state and local supplementation).

Thus, in *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 205, 212-13 (1983), the Court held that the Atomic Energy Act occupied only that portion of the field of nuclear power regulation that is based on radiological safety, leaving states free to regulate in pursuit of other interests, even where the state regulation has an incidental effect on safety. Furthermore, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-56 (1984), the Court held that the preempted field of nuclear safety regulation did not bar state punitive damages awards, even where the defendant had complied with federal safety standards, because there is no irreconcilable conflict between the two and because state punitive damages awards would not frustrate the purposes of the federal law. Just last Term, the Court again rejected a claim that all state regulation bearing some relation to the field of nuclear safety is preempted by the Atomic Energy Act. *English v. General Electric Co.*, 110 S. Ct. 2270 (1990). Instead, the Court concluded that a state infliction of emotional distress lawsuit was not preempted because it had only a remote connection to the preempted field of nuclear safety. *Id.* at 2277-78.

Against this backdrop, if the Court finds some implied preemption, it should limit FIFRA's preemptive effect to the

field that it actually occupies -- pesticide registration. Thus, the federal government (in conjunction with the states in some instances, see 7 U.S.C. § 136v(a)) decides which pesticides can be sold and used, for which purposes, and with what restrictions. Given the cost and complexity of such determinations, only a small portion of local pesticide laws, such as local bans on the use of particular pesticides or local permitting decisions that have the same effect, revisit these determinations, and thus only those laws would be preempted on the ground that they enter this field or conflict with federal regulation. Most other local laws, such as public notice ordinances and record requirements, will have at most an incidental effect on federal pesticide regulation. Accordingly, under this Court's precedents, there is no basis for finding preemption of local public notice, recordkeeping, or groundwater regulations on the ground that the federal government has occupied that field or that the local regulations conflict with, or are inconsistent with, federal law. See *North Dakota v. United States*, 110 S. Ct. 1986, 1997-98 (1990) (federal liquor procurement law designed to ensure lowest prices does not preempt state reporting and labeling requirements because they have only an incidental effect on cost).

The concerns that animated the proponents of local preemption in 1972 also support only limited preemption. The principal reason, given by both the House and Senate Agriculture Committees, was that the fifty states plus the federal government would provide an adequate number of regulatory jurisdictions. H.R. Rep. No. 511, *supra*, at 16; 1972 U.S. Code Cong. & Ad. News at 4008. That rationale would apply only where the federal government had actually taken some regulatory action. The second concern was that local governments would be incapable of making judgments that require scientific expertise that they do not have and cannot afford to acquire. 1972 U.S. Code Cong. & Ad. News at 4008.



This concern applies only to the very few local regulations that require complex scientific determinations, such as banning or restricting the use of a pesticide.

Under these rationales, local governments would be precluded from making registration decisions -- the core activity of EPA under FIFRA. Thus, local laws that ban or restrict the use of certain pesticides would be preempted, although local governments could still impose limitations in their proprietary or contracting capacity on pesticide use on public lands, in public buildings or pursuant to local government contracts. *See supra* at 11-12.

In any event, neither the desire to avoid local duplication of federal and state standards, nor the concern that local governments lack scientific expertise, would support preemption of most other forms of local regulation. For example, laws restricting aerial spraying do not ban the use of a federally registered pesticide, but rather control its application in order to address drift problems resulting from local weather conditions and geography. Accordingly, they will rarely duplicate federal standards, and whatever scientific expertise they require is readily available to the local government and, because of its uniquely local nature, is less likely to be in the hands of the EPA.

Local public notification requirements are even further removed from the articulated congressional concerns. There is nothing in the 1972 legislative history to suggest that Congress was concerned about local notice regulations. FIFRA is silent with respect to public notice, and the EPA has never adopted any such requirements. Thus, local notification laws neither duplicate federal regulation nor require scientific expertise. Moreover, they impose no more of a burden on interstate commerce than hundreds of other local conditions

of doing business in many jurisdictions.

Local record requirements involve even less scientific expertise and redundancy, particularly since most of them simply direct pesticide users to supply copies of federally or state mandated records to the locality. Moreover, since FIFRA itself allows local governments to inspect such records, 7 U.S.C. § 136f(b), and in some cases, requires pesticide users and distributors to provide information to local governments, *id.* § 136d(g)(1), such local record requirements dovetail, rather than conflict, with FIFRA's requirements.

Local regulations that are designed to prevent contamination of ground or surface water are also far afield from federal registration decisions. Often they impose restrictions on the use of the municipal water supply or sewer system. Certainly, local governments can impose restrictions on the use of city services. Moreover, any notion of implied preemption by FIFRA would be negated by the expressed federal desire for a local role in preventing surface water contamination expressed in the Safe Drinking Water Act Amendments of 1986. *See supra* at 8.

A blanket preemption ruling would preclude local regulation of a wide range of other matters that have, at most, an incidental effect on federal regulation under FIFRA. For example, it would prohibit local rules that bar the application of pesticides in schools and child care facilities when children are present, or that require landlords to notify tenants before spraying pesticides in common areas. It might even bar local governments from closing food establishments that serve food contaminated by rat poisoning, or from mandating that trucks refrain from carrying open containers of pesticides on residential streets. Local governments might also be pre-

cluded from requiring separate garbage pickups for pesticide containers to ensure that pesticide residues do not contaminate municipal dumps or seep into ground water. Certainly, there is no basis to conclude that Congress intended to curtail all local regulation that concerns the use of pesticides in some way. Instead, for preemption to occur, the local regulation must, at the very least, involve a matter that is actually regulated or specifically exempted from regulation by the federal government under FIFRA. Under that test, *amici's* ordinances must be upheld.

### CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Supreme Court of Wisconsin and hold that FIFRA does not preempt local authority or, alternatively, that FIFRA preempts only those local laws that revisit determinations actually made by the federal government.

Respectfully submitted,

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Supreme Court, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1990

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No. 89-1905  
WISCONSIN PUBLIC INTERVENOR, *et al.*,  
*Petitioners,*  
  
*v.*  
RALPH MORTIER, *et al.*,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
WISCONSIN SUPREME COURT

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**BRIEF OF THE CONSERVATION LAW  
FOUNDATION OF NEW ENGLAND, INC.  
AND THE SIERRA CLUB  
AS AMICI CURIAE IN SUPPORT OF  
PETITIONERS**

---

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No. 89-1905

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In the  
Supreme Court of the United States

OCTOBER TERM, 1990

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No. 89-1905  
WISCONSIN PUBLIC INTERVENOR, *et al.*,  
*Petitioners,*

*v.*  
RALPH MORTIER, *et al.*,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
WISCONSIN SUPREME COURT

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BRIEF OF THE CONSERVATION LAW  
FOUNDATION OF NEW ENGLAND, INC.  
AND THE SIERRA CLUB  
AS AMICI CURIAE IN SUPPORT OF  
PETITIONERS

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### INTRODUCTORY STATEMENT

This brief is submitted by the Conservation Law Foundation of New England, Inc. and the Sierra Club as amici curiae in support of the Petitioners. Written consents of all parties have been obtained and filed with the Clerk of the Court.

### INTEREST OF AMICI CURIAE

The Conservation Law Foundation of New England, Inc. ("CLF") is a non-profit, public interest, environmental law organization founded in 1966. CLF is funded by donations from thousands of private individuals and by grants and contributions from more than 40 public corporations, charitable foundations and private trusts. CLF's staff includes ten attorneys and four scientists who use law, science and

public policy analysis to pursue a wide range of environmental issues.

Pesticide use in agricultural, suburban and urban settings is a major concern. CLF has drafted and published the Massachusetts Pesticide Handbook, a primer for local regulation of pesticide application. CLF has also negotiated with utilities about pesticide uses in rights of way; participated in negotiations regarding mosquito control; and lobbied the Massachusetts legislature for pesticide laws.

The Sierra Club is a California nonprofit membership organization founded in 1892. The goals of the Sierra Club's 500,000 members are to explore, enjoy and protect the wild



places of the earth; to practice and promote responsible use of resources; to educate and enlist people to protect and restore the environment; and to use all lawful means to carry out these objectives. Both the Sierra Club and CLF are vitally interested in this case which presents issues significantly affecting future regulation of pesticide use.

#### **SUMMARY OF ARGUMENT**

Effective environmental protection requires action by federal, state and local governments. Congress, while enacting a multitude of environmental protection laws during the last three decades, has consistently and forcefully adhered to a philosophy of environmental

federalism. This approach is evident throughout the federal environmental protection scheme. Viewed within that overall context, the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988), cannot sensibly be deemed to be an act that preempts all local regulation of pesticide use. (Pp. 10 to 35.)

A three-pronged test determines whether a federal act preempts state or local regulation. There must be an express preemption in the text of the statute; or there must be such a pervasive federal occupation of the field that the Court must infer that Congress left no room for state or local activity; or there must be an actual conflict with the federal

law. FIFRA fails each of these three tests.

Despite frequent amendment of FIFRA during the last 30 years, Congress has never expressly preempted local pesticide regulation. Federal preemption should not be lightly inferred in the absence of express language. Ambiguous legislative history such as FIFRA's is not a sound platform from which to infer preemption. Additionally, it provides no basis for disregarding the traditional right of state legislatures to delegate their sovereignty to towns, cities and counties. (Pp. 36 to 43.)

FIFRA does not create a pervasive federal occupation of the pesticide regulation field since it

expressly invites more stringent state legislation. 7 U.S.C. § 136v(a). Establishment of a federal floor above which states can pursue tougher regulation is consistent with other federal environmental statutes. Having been expressly invited to legislate, states should be free to delegate within their own state systems. (P. 43.)

The Wisconsin Supreme Court did not discuss whether the Town of Casey ordinance obstructs FIFRA, which is essentially a labeling, packaging and product registration statute. There is no obstruction since the ordinance focuses on the management of local use of pesticides only insofar as the use will affect public property or the public

itself. While many federal environmental statutes authorize the creation of federal permit systems, FIFRA leaves that part of the field open. The Town of Casey ordinance effectively fills this gap in the federal law. (Pp. 44 to 47.)

Congress left it to the states to determine whether or not local governments may regulate pesticide use. The six New England states reveal the varied approaches that state governments have chosen. Maine permits local regulation. New Hampshire's comprehensive legislation has preempted the field within the state. Connecticut and Massachusetts primarily regulate from the state level, but both jurisdictions allow various forms of

local oversight. Rhode Island and Vermont have each enacted state pesticide control schemes which appear to provide room for local action, but the question of local preemption has not been addressed by either state supreme court. (Pp. 48 to 55.)

Local knowledge of water resources, wildlife habitat, and sensitive land uses is a critical aspect of effective environmental protection. FIFRA develops various application safety standards through its product-registration process, but fails to develop any process to implement those standards at a sub-federal level. The Town of Casey ordinance is a reasonable vehicle



for utilizing local knowledge. This Court should hold that FIFRA does not preempt the Town of Casey ordinance. (Pp. 55 to 60.)

#### ARGUMENT

I. **EFFECTIVE ENVIRONMENTAL PROTECTION DEPENDS UPON FEDERAL, STATE AND LOCAL INVOLVEMENT.**

Nearly thirty years ago, in her book Silent Spring, marine biologist Rachel Carson graphically described the damage that indiscriminate pesticide spraying can inflict on people, animals, land and water. After recounting numerous incidents of damage caused by pesticides to farms and forests, suburbs and cities, Ms. Carson wrote:

And what of human beings? In California orchards ... workers handling foliage that had been treated a month earlier collapsed and went into shock, and escaped death only through skilled medical attention. Does Indiana still raise any boys who roam through woods or fields and might even explore the margins of a river? If so, who guarded the poisoned area to keep out any who might wander in, in misguided search for unspoiled nature? Who kept vigilant watch to tell the innocent stroller that the fields he was about to enter were deadly -- all their vegetation coated with a lethal film?

R. Carson, Silent Spring, 126-127 (1987 ed.) (emphasis in original).

Since Silent Spring's 1962 publication, Congress has created a far reaching network of statutes to curb and, it is hoped, cure damage caused by pesticides and other

chemicals.<sup>1/</sup> Marching to the beat of the same drummer, and in many instances even more rapidly, state governments and many local lawmakers have added to the fabric of this environmental regulatory network.

In addition to FIFRA, the federal environmental safety net includes the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988) (recently amended, Pub. L. No. 101-549, 104 Stat. 2399 (1990)); the Comprehensive Environmental Response and Liability

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<sup>1/</sup>Notably, Congress itself has credited amendments to FIFRA to the impact made by Silent Spring. See H.R. Rep. No. 939, 100th Cong., 2d Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 3-74, 3775-76.

Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988); the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001-11052 (1988); the Oil Pollution Act of 1990, 33 U.S.C.A. §§ 2701-2761 (West Supp. Dec. 1990); the Toxic Substances Control Act ("TOSCA"), 15 U.S.C. §§ 2601-2629 (1988); the Safe Drinking Water Act, 42 U.S.C. §§ 300f - 300j-26 (1988); the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347 (1988); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k (1988); and the Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), 15 U.S.C. §§ 2641-2655 (1988). Even these eleven

enactments do not constitute the full body of federal environmental law.

There can be little doubt that federal environmental legislation has touched every aspect of American life. The cars we drive adhere to federal air standards. The water we drink must satisfy federal water standards. The trash we discard is disposed in accordance with federal regulations. Legions of biologists, geologists and engineers work from coast to coast under the aegis of the Federal Superfund.

However broad this federal environmental mantle, though, there can also be little doubt that the role of state and local authority in environmental protection has not

been eliminated. To the contrary, active state and local involvement is critical to successful environmental protection. Congress created its far reaching environmental code fully cognizant of the fundamental precept that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 (1985). In keeping with that precept, there runs throughout the framework of all federal environmental enactments a strong and powerful current of environmental federalism.

Congressional advocacy of environmental federalism is evident in the text and legislative history



of numerous statutes. As early as 1972, in promulgating the Federal Water Pollution Control Act, Congress declared:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution .... It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1251(b).

Fourteen years later, in the enactment of amendments to the Safe Drinking Water Act, firm adherence to environmental federalism was again evident. Congress required

every state to develop a wellhead protection program that would "identify ... all potential anthropogenic [i.e., man-made] sources of contaminants which may have any adverse effect on the health of persons." 42 U.S.C. § 300h-7(a)(3). The House Conference Report in support of this statute forcefully repeated the federalist theme:

States can be expected to take a wide variety of approaches to protection of wellhead areas within their jurisdiction, and it is conceivable that each State could develop its own unique approach. Protection strategies may also vary for different protection areas within one State. The amendment recognizes that States are best able to assess specific problems within their jurisdictions, and to develop and implement necessary protection measures. As a result, no groundwater classification assigned by the Administrator is to lessen

the level of protection assigned to an aquifer by the State in a wellhead protection area.

H.R. Conf. Rep. No. 575, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 1566, 1609.

The President, when signing the Safe Drinking Water Act amendments into law, concurred in the view that state and local action forms the first line of environmental defense:

Although we certainly agree that groundwater needs to be protected from major contaminants, we believe that States have the principal role in protecting this valuable resource, and that the EPA has sufficient statutory authority to assist the States where appropriate. In fact, the Federal government can never hope adequately to protect the groundwater resources of America without the major participation and indeed

the leadership of State and local communities, and S. 124 reflects this important understanding.

Statement by President Ronald Reagan Upon Signing S. 124, 22 Weekly Comp. Pres. Doc. 831 (June 23, 1986), reprinted in 1986 U.S. Code Cong. & Admin. News 1566, 1615.

Congress has preempted state and local environmental activity in only limited and narrow instances. For example, when an information system is necessary for the gathering and distribution of science and safety knowledge, Congress has mandated the uniform, nationwide use of certain forms. See the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11041(b) (state and local material safety data sheets

shall "be identical in content and format ...."). Elsewhere, since the trip from one's home to work or even to the local convenience store frequently crosses town lines and in some areas even state lines, Congress has preempted the establishment of automobile and fuel emission standards. See 42 U.S.C. § 7543(a). Even so, the specific field of emission control has not been fully occupied, see Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1124 (S.D.N.Y.), aff'd, 468 F.2d 624 (2d Cir. 1972), and the broader field of air pollution prevention is most certainly a federal, state and local activity. See Washington v. General Motors Corp., 406 U.S. 109, 114 (1972)

("Congress has not, however, found a uniform, nationwide solution to all aspects of [air pollution] and, indeed, has declared 'that the prevention and control of air pollution at its source is the primary responsibility of States and local governments.'").

Another consistent characteristic of federal environmental laws is that Congress does not impose federal environmental standards as ceilings beyond which state or local lawmakers cannot proceed. Rather, federal health and safety laws act as floors below which states and local governments may not set standards. In FIFRA, see 7 U.S.C. § 136v, and in numerous other federal acts, states are invariably



free to impose more stringent environmental protection than federal law requires.

Having permitted the states to impose more stringent standards in the environmental sphere, it follows from the federalist principles underlying our constitutional system that "[s]tate legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes."

Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 9 (1898). See also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) ("[W]ithin the realm of authority left open to them under the

Constitution, the States must be equally free to engage in any activity that their citizens choose ...."). The principle that states may experiment with different ways to solve environmental problems and delegate differing amounts of power to the local governments within the states, thus, lies at the heart of the federal system.

To stave experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences for the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). Examples of Congress'

carefully refraining from heavy-handed preemption and of leaving the door open for more stringent state and local environmental action are myriad.

TOSCA preserves "the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture." 15 U.S.C. § 2617(a)(1). There are only two exceptions. First, states and localities may not impose duplication of testing required by the federal government. 15 U.S.C. § 2617(a)(2). Second, states may not create rules where the federal Environmental Protection Agency

("EPA") has done so unless the State rule is identical to the federal version; enacted pursuant to any other federal law; or, notably, unless the State rule "prohibits the use of such substance or mixture in such State or political subdivision." Id. See also Sed, Inc. v. City of Dayton, 519 F. Supp. 979, 990 (S.D. Ohio 1981) ("Deference to, or nonpreemption of state regulation which serves the purposes of other existing federal environmental legislation, even if only remotely or incidentally, was similarly and clearly intended.") (emphasis in original).

NEPA, though not itself applicable to the states unless a partnership exists between the federal and

state governments on a specific project, see Proetta v. Dent, 484 F.2d 1146, 1148 (2d Cir. 1973), expressly recognizes the importance of cooperation on environmental issues among federal, state and local governments:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, ... declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, ... to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony ....

42 U.S.C. § 4331(a).

CERCLA follows the "federal environmental floor" approach by declaring that none of its provisions "shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). While excluding applications of registered pesticides from certain sections, CERCLA also expressly preserves "obligations or liability" under any other State or Federal law for damages resulting from the release, removal or remediation of "hazardous substances," 42 U.S.C. § 9607(i), a term which includes numerous pesticides: captan, carbaryl (sevin), chlordane,



DDT, diazinon, malathion and parathion. 40 C.F.R. § 116.4, Table 116.4A.

RCRA recognizes that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies ...." 42 U.S.C. § 6901(a)(4). An objective of RCRA is the establishment of "a viable Federal-State partnership...." 42 U.S.C. § 6902(a)(7), and the statute allows state and local imposition of more stringent solid waste disposal requirements. 42 U.S.C. § 6929.

The Oil Pollution Act of 1990 allows State and local governments to exceed federal liability and removal requirements for oil spills.

33 U.S.C.A. § 2718. Notably, the legislative history declares:

The issue of Federal preemption of State laws is one that often arises during the formulation of legislation which imposes Federal environmental controls. To date, Federal legislation has affirmed the rights of States to protect their own air, water, and land resources by permitting them to establish State standards which are more restrictive than Federal Standards.

Senate Report (Environment and Public Works Committee) S. Rep. No. 94, 101st Cong., 1st Sess., July 28, 1989.

Against this panoply of federal environmental law, the Wisconsin Supreme Court's holding that, by implication, FIFRA preempts a local ordinance regulating pesticide use is aberrational as a matter of

federal policy as well as a sharp departure from well established preemption principles. The common-sense reading of FIFRA is Petitioner's: the statute is a labeling and licensing law, not a law that regulates every conceivable pesticide use in every hamlet in the United States. Recognizing the fact that pesticides generally are produced by a handful of large manufacturing corporations, then distributed nationally and even internationally, Congress has decided it is economic and efficient to use federal power to centralize and standardize the registration and description of pesticides. It strains credibility, however, to think that Congress intended the EPA

and the state governments -- without any local regulatory activity -- to oversee the proper application of pesticides in every climate, over every varied topography, or in every workplace, restaurant, hospital or apartment building in the United States.

Safe use of chemicals in the environment requires a detailed knowledge of local conditions: prevailing winds at different times of the day, the presence or absence of surface water or groundwater, the directional flow of groundwater, the local topography, and local land uses, the seasonal habits of local fish, fowl and other wildlife and in some instances even their daily habits. The importance of local

knowledge is illustrated by a study of pesticide use conducted in Texas:

Weather-related elements including horizontal and vertical air movements, air temperature, and relative humidity in the immediate application area all affect drift....

The weather factor most commonly associated with drift is horizontal wind speed. However, estimating drift is not a simple function of knowing wind speed. Wind speed, and thus drift, will increase with height because objects on the ground (particularly crops) have the effect of slowing down wind speed in the affected area. The effects of horizontal wind speed also depend on the type of ground surface in the area -- not just terrain but crops as well. For instance, when studying air movements over two fields, researchers found fairly regular increases in wind speed (with height) in a wheat field, but in a beet field there was substantial turbulence.

Policy Research Project on Pesticide Regulation in Texas, The University of Texas at Austin, Regulating Pesticides in Texas, A Report of the Lyndon B. Johnson School of Public Affairs Policy Research Project on Pesticides in Texas (September 11, 1984) at 118-119.

Surely a local official is more likely than a federal or state administrator in a far-away city to know where local water supplies exist, what times of day local weather is likely to increase or decrease pesticide drift, and what times and places pesticide application will subject residents and



animals to risk.<sup>2/</sup> Chemicals dispersed into the environment -- whether outdoors in fields or indoors in restaurants and nursing homes -- have their greatest impact locally. Surely the intent of FIFRA is to minimize environmental harm. Achieving that objective requires that regulators try to calibrate the use of chemicals as precisely as possible. That calibration is best achieved by the involvement of local

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<sup>2/</sup>"The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible." Garcia, 469 U.S. at 576 (Powell, J., dissenting).

as well as federal and state officials in pesticide use.

**II. FEDERAL LAW HAS NOT PREEMPTED LOCAL REGULATION OF THE USE OF PESTICIDES.**

Application of the test for federal preemption to the language and purpose of FIFRA shows that FIFRA does not preempt municipal regulation of pesticides. Under the Supremacy Clause, federal law may supercede local law in any of three ways. Congress may preempt state or local authority by simply stating so in express terms. Hillsborough, 471 U.S. at 713; Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). In the absence of express language, Congress' preemptive intent may be inferred only from a pervasive scheme of federal regulation that

leaves no room for supplementary state or local regulation. E.g., Hillsborough, 471 U.S. at 713; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Federal legislation also preempts any state and local laws that actually conflict with or present an obstacle to the federal law. Jones, 430 U.S. at 525-26.

**A. FIFRA Does Not Explicitly Preempt Municipal Regulation.**

No language in the text of FIFRA itself expressly excludes local governments from regulating the use of pesticides. See 7 U.S.C. §§ 136-136y. Congress could easily have accomplished local preemption in FIFRA by adding five words -- "but not its political subdivisions" -- to the text of 7 U.S.C.

§ 136v(a). Despite numerous amendments to FIFRA in the last thirty years, however, Congress has never done so.<sup>3/</sup>

Ignoring the requirement that express preemption requires there to be express language, the Wisconsin Supreme Court incorrectly deduced that because Congress did not include the phrase "political subdivision" in its statutory definition of "State," Congress intended to deprive political subdivisions of

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<sup>3/</sup>For example, the Clean Air Act expressly preempts state and political subdivisions with respect to vehicle emissions and fuel composition. 42 U.S.C. § 7543(a) ("No state or political subdivision thereof shall adopt [any emissions standards for new motor vehicles].") (emphasis added).

any authority over pesticides. See Mortier v. Town of Casey, 154 Wis. 2d 18, 29, 452 N.W.2d 555, 560 (1990). Congress, however, simply defined the term "State" to mean "a State." See 7 U.S.C. § 136(aa). It has done th's on numerous occasions in other environmental statutes.<sup>4/</sup>

Ironically, the oxymoronic holding that FIFRA expressly, by implication, preempts local regulation ignores traditional principles

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<sup>4/</sup>See the Clean Water Act, 33 U.S.C. § 1362(3); the Clean Air Act, 42 U.S.C. § 7602(d); TOSCA, 15 U.S.C. § 2602(13); CERCLA, 42 U.S.C. § 9601(27); RCRA, 42 U.S.C. § 6903(31); the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11049(9); and the Safe Drinking Water Act, 42 U.S.C. § 300f(13).

of state sovereignty that make a state free to delegate its powers to its political subdivisions. Walla Walla, 172 U.S. at 9; Central Maine Power Co. v. Town of Lebanon, 571 A.2d 1189, 1192 (Me. 1990). Given the historical importance of a state's right to delegate its powers in our federal system, preemption of that right should not be accomplished by the guesswork of implication or by dependence upon muddled legislative history.

Contrary to the ruling of the Wisconsin Supreme Court, the legislative history does not demonstrate a "clear and manifest purpose of Congress" to preempt local regulations. See Jones, 430 U.S. at 525. It is inappropriate to discern



"clear and manifest" congressional purpose from legislative history alone, especially where the legislative history itself is inconclusive.<sup>5/</sup> The legislative history

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<sup>5/</sup>"The question whether federal law preempts state action, cannot be reduced to general formulas, but there does appear to be an overriding reluctance to infer preemption in ambiguous cases.... [T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia [v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)], relied to protect states' interests." L. Tribe, American Constitutional Law, 479-80 (2d ed. 1988) (emphasis in the original).

As the plain language of the statute is clear, resort to legislative history would not appear to be proper. National Agricultural Chemicals Ass'n v. Rominger, 500 F. Supp. 465, 469 (E.D. Cal. 1980).

of FIFRA arrived at very different conclusions. Compare COPARR, Ltd. v. City of Boulder, 735 F. Supp. 363, 366 (D. Colo. 1989); People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 492; 683 P.2d 1150, 1160; 204 Cal. Rptr. 897, 907 (1984); Town of Lebanon, 571 A.2d at 1193 with Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109, 113 (D. Md. 1986), aff'd without opinion, 822 F.2d 55 (4th Cir. 1987); Professional Lawn Care Ass'n v. Village of Milford, 909 F.2d 929 (6th Cir. 1990). Given the views of some, but not all, legislators in favor of preemption, Congress adopted a compromise position of neutrality that left the states free to distribute authority

between themselves and their political subdivisions if they choose.<sup>6/</sup> See County of Mendocino, 36 Cal. 3d at 492, 683 P.2d at 1160, 204 Cal. Rptr. at 907. In sum, the absence of express preemption in FIFRA's text, and the ambiguous nature of the legislative history, combined

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<sup>6/</sup>The legislative history behind the subsequent 1988 FIFRA amendments reveals that Congress recognized that localities engage in regulation of pesticide use:

Concern about the inadequacy of data that support current pesticide regulations fuels much of the controversy surrounding pesticide use. Such concern, in turn, reinforces the desire by States and their political subdivisions to assert greater control over pesticide use.... (emphasis added)

H.R. Rep. No. 939, 100th Cong., 2nd Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 3474, 3478.

with the traditional presumption against preemption warrants the reversal of the Wisconsin Supreme Court.

**B. FIFRA Does Not Create a Pervasive Federal Regulatory Scheme.**

Congress did not create a federal scheme under FIFRA that is so pervasive as to preclude supplementation by other levels of government. In fact, Congress explicitly invited action by other governments in the area of pesticide regulation. See 7 U.S.C. § 136v. That provision alone eliminates the need for the Court to consider whether a pervasive federal scheme exists or whether Congress intended to occupy fully the field of pesticide regulation. The statutory text expressly proves that Congress had no such intention.

C. **The Town of Casey Ordinance Does Not Conflict With FIFRA, Nor Is It An Obstacle To FIFRA.**

A conflict between state and federal law exists only when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Jones, 430 U.S. at 526 (quoting Hines v. Davidowitz, 312 U.S. 351, 363 (1941)), or "when compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963). The Wisconsin Supreme Court did not rule on whether the Town of Casey ordinance conflicts with FIFRA, and the U.S. government agrees with the Petitioner that the ordinance is not

preempted. See Brief for the United States as Amicus Curiae on Petition For a Writ of Certiorari at 4. The Town of Casey ordinance simply fills in a gap in federal and state pesticide regulations.

FIFRA regulates the labeling and packaging of pesticides, registration of products under categories for general or restricted use and certification of applicators of pesticides. See 7 U.S.C. §§ 136-136y. The Town of Casey ordinance, on the other hand, consists of notice requirements to inform neighbors and passers-by and permit requirements to protect the local community, its inhabitants and the environment. See Town of Casey ordinance, Ordinance No. 85-1, § 1.3. It



governs the time, place and manner of the actual pesticide application, a matter that directly affects the local community. See id. See also New York State Pesticide Coalition v. Jorling, 874 F.2d 115, 120 (2d Cir. 1989) (court held that FIFRA did not preempt state notification requirement because "Congress intended to moderate the behavior of people who sell and apply pesticides," but "New York provisions are designed to warn the public....").

Unlike other federal environmental laws, FIFRA does not establish a permit system for the application of pesticides. Compare, for example, the Clean Air Act, 42 U.S.C. §§ 7401-7642, and the Clean Water Act, 33 U.S.C. §§ 1251-1387,

which authorize federal emission and discharge standards as well as the implementation of federal permit schemes. The Town of Casey ordinance fills in the use-permit gap in pesticide regulation.

FIFRA also lacks notice requirements to protect passers-by and abutters. Nor does it address setback distances for surface water and groundwater supplies. Again, the Town of Casey ordinance provides a vehicle for filling these gaps. Rather than obstruct the federal packaging and labeling scheme, the ordinance assists in fulfilling the overall federal goal of environmental protection.

**III. CONGRESS LEFT IT TO THE STATES TO DETERMINE WHETHER LOCALITIES MAY OR MAY NOT REGULATE PESTICIDE USE.**

FIFRA, except for setting a federal floor below which sale or use regulation may not dip, does not tell the fifty states how to regulate pesticide use. FIFRA's dictate is permissive: "A state may regulate the sale or use of any federally registered pesticide ...." 7 U.S.C. § 136v(a) (emphasis added). Accepting this federalist invitation, different states have pursued different approaches.

**A. The Six New England States Have Taken a Varied Approach to Local Pesticide Use Regulation.**

Although a fifty-state survey is beyond the scope of this brief, the activities of the six New

England states are indicative of a varied approach.

Maine provides that municipalities may petition the Board of Pesticides Control (the "BPC") for the establishment of "critical areas" and comment on mandatory pesticide management plans. Me. Rev. Stat. Ann. tit. 22, § 1471-M (Supp. 1990). In addition, in recognition of the existence and need for local pesticide ordinances, Maine law requires the BPC to maintain a centralized listing of municipal ordinances related to pesticide storage, distribution or use. See Me. Rev. Stat. Ann. tit. 22, § 1471-U (Supp. 1990). The Maine Supreme court has held that neither the Pesticide Control Act,

Me. Rev. Stat. Ann. tit. 7, §§ 601-625 (1989), nor the Pesticide Board Act, Me. Rev. Stat. Ann. tit. 22, § 1471-A, preempts local pesticide ordinances. Town of Lebanon, 571 A.2d 1189 (Me. 1990).

New Hampshire has also enacted a number of pesticide laws. See N.H. Rev. Stat. Ann. §§ 430:1-430:48 (1990). The New Hampshire Supreme Court has ruled that the state legislature fully occupied the field by virtue of its pesticide enactments. Accordingly, New Hampshire localities may not enact pesticide ordinances. Town of Salisbury v. New England Power Co., 121 N.H. 983, 437 A.2d 281 (1981).

Vermont regulates the "sale, use, storage, treatment and disposal

of pesticides and pesticide wastes" through the Commissioner of Agriculture, Food and Markets. Vt. Stat. Ann. tit. 6 §§ 911-929, 981-986, 1021-1025, 1082-1084, 1101-1111 (1988 & Supp. 1990). These statutes do not expressly address local pesticide use control, and the issue has not been addressed by the Vermont Supreme Court. Notably, however, the Vermont Water Pollution Control Law alludes to "federal, state and local laws and regulations" (emphasis added) in the context of herbicide and pesticide use. See Vt. Stat. Ann. tit. 10 § 1283(g)(2)(B) (Supp. 1990).

Rhode Island has enacted the Pesticide Control Act of 1976, R.I. Gen. Laws §§ 23-25-1 - 23-25-36.



The act is administered by the Director of Environmental Management. The act does not speak to local regulation, and the issue apparently has not been litigated.

Connecticut expressly allows some local regulation of pesticide use. The Connecticut Pesticide Control Act, Conn. Gen. Stat. Ann. §§ 22a-46 - 22a-66z (West 1985 & Supp. 1990), gives the Commissioner of Environmental Protection "exclusive authority in the regulation of pesticide spraying," *id.*, § 22a-54(a), but also declares that "[p]ermits for aircraft spraying in congested areas shall be issued only with the approval of the director of health of the municipality in which

the operation is to be conducted." *Id.*, § 22a-54(e)(4).

In the Commonwealth of Massachusetts, as of 1988, over 50 towns had passed regulations relating to pesticide control. See Commonwealth of Massachusetts Department of Environmental Quality Engineering, Pesticide Regulation in Massachusetts: An Analysis of Local, State, and Federal Controls at 1 (February 1988) [hereinafter "Pesticide Regulation in Massachusetts"]. Although significant portions of local power have been preempted by state legislation and regulation, see Town of Wendell v. Attorney General, 394 Mass. 518, 476 N.E.2d 585 (1985), localities may still require pesticide applicators to appear before boards of

health to demonstrate that pesticides will only be used in accordance with the law. Id.

Consequently, Massachusetts communities have enacted zoning by-laws, general by-laws, board of health regulations and advisory resolutions that regulate pesticide-related activities in specific sensitive areas. Pesticide Regulation in Massachusetts at 1, 2, 15. The Attorney General must first approve the zoning by-laws and the general by-laws,<sup>1/</sup> but local board of health regulations do not require

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<sup>1/</sup>This approval process involves all town zoning by-laws and general by-laws, not just pesticide enactments. See Mass. Gen. L. ch. 40, § 32 (1988); ch. 40A, § 5 (1988).

such approval. Id. at 4-6; Mass. Gen. L. ch. 111, § 31 (1988 & 1990 Supp.).

**B. Local Regulation Can Play An Important Role In Reducing Pesticide Damage.**

Local ordinances such as the one promulgated by the Town of Casey can play an important role in preventing harm to the community. The ordinance sets up a simple permit and notification framework that neither FIFRA nor the Wisconsin state statutes governing pesticides address. The ordinance applies only to pesticide applications directly affecting the public, either by application to land owned or used by the public or by aerially spraying, which by its very method may drift onto other lands or into private

residences. See Preamble to Town of Casey Ordinance 85-1 ("aerial spraying of pesticides increases the risk of injury or damage to persons, property and the environment, due to the increased likelihood of pesticide drift and pesticide overspray").

A pesticide applicator must submit information that describes the purpose of the pesticide application, the date and time, a description of the location, an identification of the pesticide, the existence of available pest-control alternatives, the anticipated impact of the application, and a description of the precautions the applicator intends to take. Ordinance 85-1, 1.3(2). The ordinance also provides for a hearing if the Board

initially rejects or restricts the request. Id., § 1.3(4), (5). The ordinance also provides for notification of the impending application by use of placards at least 24 hours prior to the application. Id., § 1.3(7).

Under the terms of the ordinance, the Town may deny or impose conditions on a permit for reasons "related to the protection of the health, safety and welfare" of the town residents. Id., § 1.3(3). The Town may require that a pesticide application be confined to an area that the public does not use for recreation or that the person utilize a method of ground application of the pesticide rather than aerial spraying. Id.



Without a system in place for review of specific pesticide applications for areas of public concern, communities are at a serious disadvantage in protecting themselves -- their residents, animals, land and water -- from exposure to potentially hazardous substances. Although the use of pesticides to control weeds and minimize crop damage has led to improvements in agricultural productivity, "it has also led to increased risk of harm to humans and the environment." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 990 (1984).

Communities that bear the direct risk of harm should be the ones to assess "the likelihood of

individualized risks" and how such risks could adversely affect their lives and their environment. See generally id. at 1016 ("public disclosure [of trade-secret data pursuant to FIFRA] can provide an effective check on the decision-making processes of EPA and allows members of the public to determine the likelihood of individualized risks peculiar to their use of the product"). Without state and local participation, protection against the risks of pesticide use will remain incomplete.

#### IV. CONCLUSION

For the reasons set forth above, and for the reasons set forth in Petitioners' brief, the Conservation Law Foundation and the Sierra Club urge the Court to reverse the Wisconsin Supreme Court by holding that FIFRA does not preempt the Town of Casey ordinance.

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DATED: February 28, 1991

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OFFICE OF THE CLERK

In The  
Supreme Court of the United States  
October Term, 1990

WISCONSIN PUBLIC INTERVENOR, and  
TOWN OF CASEY,

*Petitioners,*

vs.

RALPH MORTIER and WISCONSIN  
FORESTRY/RIGHTS-OF-WAY/TURF COALITION,

*Respondents.*

On Writ Of Certiorari To The  
Supreme Court Of Wisconsin

BRIEF AMICI CURIAE OF THE STATES OF HAWAII,  
ALABAMA, ILLINOIS, KANSAS, MAINE,  
MICHIGAN, MISSOURI, NEVADA, PENNSYLVANIA,  
UTAH and VERMONT IN SUPPORT OF PETITIONERS

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No. 89-1905

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BRIEF AMICI CURIAE OF THE STATES OF HAWAII,  
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MICHIGAN, MISSOURI, NEVADA, PENNSYLVANIA,  
UTAH and VERMONT IN SUPPORT OF PETITIONERS

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of reversal of the judgment of the Supreme Court of Wisconsin entered in the proceeding below on March 12, 1990.

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## INTEREST OF AMICI CURIAE

The amici States have a significant interest in seeing that their authority to regulate the use of pesticides in order to protect the health, safety, and welfare of their citizens can be most effectively utilized by having the option to delegate some or all of their power to regulate pesticide use to local units of government which may have better knowledge of and thus better ability to deal with local problems. The Wisconsin Supreme Court decision, by denying States this option to delegate some regulatory functions to local units of government, may thus hinder every State's ability to most effectively deal with pesticide-related problems. Furthermore, the decision below, by allowing States to regulate pesticide use, but denying States the ability to do some or all of this regulation through its political subdivisions, fundamentally deprives every State of its sovereign right to determine for itself how best to structure its governmental institutions and lawmaking processes.

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## ARGUMENT

### A. FIFRA Fails to Indicate a Clear and Manifest Purpose of Congress to Deprive Local Governments of their Historic Police Power to Regulate for the Health, Safety, and Welfare of their Citizens.

It is undisputed that the historic police powers of the States are not to be superseded by federal legislation unless that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This mandate is especially strong in the case at bar

because "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 719 (1985). As discussed below, this case falls far short of indicating anything even close to a "clear and manifest purpose" of Congress to preempt local pesticide regulation, for the statutory language of FIFRA actually supports concurrent regulation by local governments, and, at worst, yields ambiguity.

Generally, this Court has delineated three categories for concluding that preemption is warranted. First, preemption will be found where the statute explicitly provides for preemption in "express terms." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203 (1983). Second, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for supplemental regulation, "implied preemption" will be found. *Pacific Gas*, 461 U.S. at 203-04. Finally, state and local laws are preempted to the extent that they actually conflict with federal law. *Pacific Gas*, 461 U.S. at 204.

It cannot be reasonably argued that either the second or third forms of preemption are warranted in this case. This Court need not even look at the entire FIFRA regulatory scheme to know that Congress did not intend to so occupy the field as to leave no room for supplemental regulation, as FIFRA explicitly allows for supplemental State regulation of the "sale or use of any federally registered pesticide or device in the State" provided the State does not permit sale or use prohibited by FIFRA. 7 U.S.C. § 136v(a). Obviously then, Congress in enacting FIFRA did not intend that pesticide regulation was to be

exclusively a federal matter. See *People ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1159 (Cal. 1984).

Nor is there any plausible argument that the Town of Casey ordinance, by imposing a permit requirement and allowing limitations on the areas and methods of pesticide spraying, conflicted with FIFRA. That the ordinance may provide for even stricter controls on the use of pesticides than the minimum requirements of FIFRA does not create a conflict. A conflict arises only where "compliance with both federal and [local] regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas*, 461 U.S. at 204 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Neither situation exists in this case. Respondents' argument to the Court below that the Town's ordinance stands as an obstacle to the accomplishment of the objectives of Congress because it would interfere with Congress' alleged intent "that the responsibility for determining pesticide use [ ] be made on at least a statewide basis" is a circular one. For if Congress intended no preemption of local regulation, then there is no intent of Congress that decisions regarding pesticide use be made only on a statewide basis.

Consequently, the only way this Court can find that "clear and manifest purpose" to preempt local legislation is to find in the FIFRA statute language *expressly* and *explicitly* preempting local regulation. No such language exists.

First, there is no language in the entire FIFRA Act that even remotely *expressly* prohibits local government regulation of pesticides. This proposition cannot be and, up to now, has not been disputed by any party to this case. This fact alone should end the inquiry. Given that preemption is not to be inferred in the absence of a "clear and manifest purpose" of Congress to oust supplemental regulation, and the fact that the regulation of health and safety matters is primarily, and historically, a matter of local concern, *Hillsborough County, supra*, Congress' failure to include an express and unambiguous prohibition on local government regulation is fatal to finding preemption under the "express statutory preemption language" category. For surely if Congress intended to *expressly* preempt local regulation, it would have done just that by using language that explicitly preempts local regulation. It was thus improper and, frankly, illogical for the Wisconsin Supreme Court to have delved into the legislative history to find *express* preemption. If the language of the statute was not clear enough on its face to be deemed to have *expressly* preempted local regulation (which even the Wisconsin Supreme Court conceded was the case, calling the language "ambiguous." See *Mortier v. Town of Casey*, 452 N.W.2d 555, 557-58 (Wis. 1990)), there can be no *express* statutory preemption by definition!

Second, if the statutory language of FIFRA says anything at all with respect to local regulation, it is that local regulation is permitted. 7 U.S.C. § 136v(a) specifically provides that *States* "may regulate the sale or use" of pesticides provided they don't permit any sale or use prohibited by FIFRA. Because States often distribute some of their lawmaking or regulatory power to local



governmental units, the reasonable inference from this statutory authorization is that local units may also regulate pesticide use, if the States so choose to delegate some or all of their FIFRA-approved power to local governments.

Thus, the Wisconsin Supreme Court's contrary conclusion is without merit. Assuming that the term "States" in 7 U.S.C. § 136v(a) includes only states and not political subdivisions, 7 U.S.C. § 136(aa), that does not mean that the States may not choose to regulate *through their* subdivisions. See *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 935 (6th Cir. 1990) (Nelson, J., concurring). There is good reason for FIFRA not to directly authorize local governments to regulate, for doing so could mean that local governments would be able to regulate even if the State did not want them to, thereby depriving the State of the right to decide whether or not to delegate its power to the subdivisions. See *County of Mendocino*, 683 P.2d at 1160. To avoid this usurpation of State sovereign power, FIFRA only explicitly authorized the *States* to coregulate, leaving it up to each individual state to decide whether to allocate some of that power to local governmental units.

Even if this Court declines to construe § 136v(a) as an *express approval* of local governmental regulation, § 136v(a) surely does not *expressly disapprove* local governmental regulation. And it is the latter issue that determines preemption because local governmental units possess the inherent power to regulate for the health, safety, and welfare of their people. To find preemption, FIFRA must expressly *take away* their powers. As already noted, § 136v(a) indisputedly does not *expressly* bar local

governmental regulation. And the Wisconsin Supreme Court's argument that § 136v(a) *implicitly* bars it by only granting authority to the States is flawed for three reasons. First, the statute's failure to mention local governments when mentioning states does not mean that local governments are excluded from the authorization based on the statutory maxim *expressio unius est exclusio alterius*. For the maxim simply has no application where the purportedly excluded entity is a subdivision or part of the included entity. See *County of Mendocino*, 683 P.2d at 1160. Second, even if the maxim is applied so that § 136v(a) is interpreted to only authorize states and not local governments to regulate, as discussed in the previous paragraph, that does not mean that the States may not choose to regulate *through* their subdivisions. Finally, even if the failure to include "local governments" in § 136v(a) is taken to mean that only States and not local governments are *authorized* to regulate, that does not amount to a *prohibition* on local government regulation, as such governments, as just mentioned, do not need any congressional authorization to exercise their inherent powers to regulate for the health and safety of their people. See *Mendocino*, 683 P.2d at 1160.

In short, the statutory *language* of § 136v(a) clearly does not establish a "clear and manifest purpose" to preempt local government regulation. At the very most, it simply fails to *explicitly authorize* local regulation. The Wisconsin Supreme Court's need to resort to legislative history itself indicates the failure of Congress to "clearly and manifestly" preempt local regulation. There should be no further inquiry.

However, assuming, *arguendo*, this Court concludes that resort to legislative history is appropriate, a brief discussion on that matter is warranted. Because the parties will fully discuss the legislative history in their briefs, amici will not further burden the Court with repetition. But amici do note that the legislative history is at best ambiguous, and thus again fails to establish the "clear and manifest purpose" of Congress to preempt.

Even if it was the understanding of the Senate Committee on Agriculture and Forestry that § 136v(a) was meant to preempt local government regulation, that does not indicate that the full Senate, when voting to pass the final bill, had the same understanding. There is nothing in the congressional record to indicate that the full Senate ever discussed the matter of local government regulation.<sup>1</sup>

This distinction is especially significant because the Senate Committee on Agriculture and Forestry's view was not the only interpretation of § 136v(a). There is a strong argument that the Senate Commerce Committee actually viewed the original bill as *not* preempting local government regulation when it stated in a report that the original bill "does not specifically prohibit local governments from regulating pesticides." S.Rep.No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code and Cong. &

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<sup>1</sup> Senator Allen's insertion into the Congressional Record of the original report of the Senate Committee on Agriculture and Forestry, 118 Cong. Rec. 32,252-32,256 (1972), is simply irrelevant as that report only directly concerns the original version of the bill, and not the final compromise bill as presented to the floor.

Ad. News 4092, 4111. Respondents may argue, however, that even the Commerce Committee must have viewed the original bill as preempting local government regulation for otherwise they would not have proposed the *amendment* that specifically authorized local regulation. Such an argument, however, must fail because the Commerce Committee was very aware of other committees' contrary view that the bill did preempt local regulation, *see id.*, and thus the Commerce Committee could have seen the amendment as a way of "playing it safe" and ensuring that the final bill is not interpreted to preempt local regulation. Therefore, given the divergent views of the two Senate Committees, the absolute silence of the committee that issued the final compromise bill, *see* 118 Cong. Rec. 32,257-32,258 (1972), and the completely unknown views of the vast majority of Senators and Representatives who actually voted on the final bill, it is plainly wrong to conclude that the Congress "clearly and manifestly" intended anything at all with respect to local governmental regulation.

Furthermore, although the Senate Commerce Committee's proposed amendment specifically allowing local government regulation was not included in the final bill, there is absolutely no indication in the congressional record as to why it was not included. For all we know, it may have been left out because some Senators may have felt it unnecessary, given that the original version did not expressly preempt local regulation. It is just as significant to point out that no express statutory preemption language was ever added to the bill despite the disagreement among the Senate Committees.

Finally, as demonstrated by the above discussion, and as so eloquently argued by Justice Scalia, “[c]ommittee reports, floor speeches, and even colloquies between congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.” *Thompson v. Thompson*, 484 U.S. 174, 191-192 (1988) (Scalia, J., concurring). Resort to the text of the law, and avoidance of manipulable and inconclusive legislative history, especially should be the rule when we are attempting to find preemption by statutory “express terms.”

If we heed this warning and look to the statutory text, we find further support for the notion that local governments were not preempted from regulating pesticide use. Section 136v(b) states that “[s]uch State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.” Thus, where Congress intended FIFRA to preempt other regulation, it explicitly and unambiguously so stated in the statutory text. The failure of the FIFRA statutory text to similarly expressly and clearly preempt local regulation should thus be seen as indicating an intent not to preempt local regulation, and at worst an ambiguous intent. Either way, preemption cannot be sustained.

Furthermore, although § 136v(b) only prohibits “States” from regulating labeling or packaging, it is obvious that Congress intended by that provision that local governments also be prohibited from regulating labeling or packaging. Any other conclusion would lead to an absurd result. Therefore, the term “States” in

§ 136v(b) must be interpreted to include local governments. It then follows that § 136v(a)’s reference to “States” should be similarly interpreted to include local governments, given the “presumption that identical words used in different parts of the same act are intended to have the same meaning.” *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); see also *United States v. Cooper Corp.*, 312 U.S. 600, 606-607 (1941). Thus, § 136v(a), based solely on a reading of the statutory text, should be interpreted to explicitly authorize local government regulation.

Finally, 7 U.S.C. § 136t(b) (emphasis added) of FIFRA, states that:

The Administrator [of the Environmental Protection Agency] shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this subchapter, and in securing uniformity of regulations.

This provision clearly indicates that political subdivisions were intended to have the ability to coregulate. To hold otherwise would make the directive to the Administrator to cooperate with agencies of political subdivisions to secure uniformity of regulations meaningless.

In sum, Congress, by using statutory language in FIFRA that actually supports concurrent local governmental regulation, by failing to expressly prohibit local regulation, and by providing legislative history that is at best ambiguous, did not demonstrate a “clear and manifest purpose” to preempt the historic police powers of local governments to regulate for their citizens’ health,



safety, and welfare. Therefore, this Court's decisions require that no preemption be found.

**B. FIFRA Cannot Be Interpreted to Prohibit States from Delegating their Authority to Regulate to their Political Subdivisions Without Violating the Fundamental Sovereign Power of the States to Determine For Themselves the Structure of their Governmental Institutions and Lawmaking Processes.**

If this Court were to conclude that Congress, in enacting FIFRA, clearly and manifestly intended to preempt local governmental regulation, FIFRA would be an unconstitutional intrusion into the very heart of State sovereignty. To dictate to a State that it may regulate pesticide use at the State level but may not delegate some of that authority to its political subdivisions is, essentially, to tell the State how to govern itself. There can be no more fundamental aspect of State sovereignty than the State's power to decide for itself how to structure its own governmental institutions and how to enact and execute its laws.

If FIFRA is interpreted to bar local governmental regulation, then the States are forced to regulate at the State level and are absolutely prohibited from choosing to delegate some or all of their regulatory power to local units of government, even though the States may have made the fundamentally sovereign decision that pesticide regulation is best carried out at the local level. This usurpation of State sovereign authority is inconsistent with principles of federalism inherent in the Constitution. As Professor Tribe has so cogently stated:

The most fundamental threats to state sovereignty – those that genuinely portend reduction of the states into 'field offices of the national bureaucracy' or 'bureaucratic puppets of the Federal Government' – would seem to arise less from federal laws that impose *substantive* constraints on state and private actors alike (such as the wage and hour provisions at issue in *National League of Cities v. Usery*) than from federal laws that *restructure* the basic institutional design of the system a state's people choose for governing themselves.

L. Tribe, *American Constitutional Law* 397 (1988) (citations omitted). If FIFRA bars local regulation, then it will restructure the basic governmental institutional design of all those States which have chosen to have their political subdivisions exercise regulatory power for the health, safety, and welfare of their citizens. Thus, unlike the law in *Usery* and *Garcia* which only imposed substantive restraints on private and State actors alike and did nothing to alter the basic governmental institutional structure of the states, the Wisconsin Supreme Court's interpretation of FIFRA acts peculiarly on States, and not private parties, and most importantly imposes a "states only" institutional lawmaking structure on the states.

Thus, amici States' position is not weakened by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) (overruling *Usery*), which held only that there was "nothing in the overtime and minimum-wage requirements of the [FLSA Act], as applied to [the City Transit Authority] that is destructive of state sovereignty . . . . [The Authority] faces nothing more than the same minimum-wage and overtime obligations that hundreds

of thousands of other employers, public as well as private, have to meet." This Court has yet to uphold a federal law that, unlike the FLSA, so fundamentally intrudes into state sovereign authority as FIFRA would under the Wisconsin Supreme Court's interpretation. Thus, even Professor Tribe, a harsh critic of *Usery*, has suggested that it is unconstitutional for Congress to impinge on a State's "authority to decide, consistent with equal protection of the laws, *how* one's people will represent themselves and participate in their own governance [because that authority] seems the very essence of *all* self-government." Tribe, *supra*, at 398.

Had Congress, for example, allowed States to regulate pesticide use on the condition that all such state laws be passed by a lower house consisting of 50 members, then passed by an upper house of 30 members, with an 80% quorum requirement, and then signed by the Governor within 2 days, such a law would have been a flagrantly unconstitutional intrusion into the States' sovereign authority to decide for themselves their appropriate governmental lawmaking structure and procedure. Yet, such a requirement is qualitatively no more intrusive than is FIFRA, if interpreted to preempt local regulation. For FIFRA, so interpreted, tells States that they may only govern themselves in a matter directly affecting the health and safety of its people by invoking the state lawmaking institutions, and may not choose to allocate any decisionmaking power over pesticide matters to local governmental units even though the latter may be the best equipped to deal with the matter and the most accountable to the affected people. Although the *wisdom* of a State's sovereign policy decision to allocate power to

local entities is not relevant to the federalism question, the point is that it is solely and exclusively the State's authority to make that decision for itself, without interference from the federal government.

In *Federal Energy Regulatory Commission v. Mississippi* ("FERC"), 456 U.S. 742, 771-75 (1982), Justice Powell, dissenting in part, singled out certain procedural provisions of PURPA as violative of the Tenth Amendment. Those provisions imposed federal procedures on state regulatory institutions, by directing, *inter alia*, that the Secretary of Energy may intervene and participate as a matter of right in State regulatory proceedings respecting electrical rates. Said Justice Powell, "I know of no other attempt by the Federal Government to supplant state-prescribed procedures that in part define the nature of their administrative agencies. [] Congress may [not] do this." (Justices O'Connor and Rehnquist, and then Chief Justice Burger went further and struck down two entire Titles of PURPA).

The analogy is clear. If it violates the Tenth Amendment and principles of federalism for Congress to impose such minimally intrusive (relatively speaking) procedural requirements upon State regulatory agencies, then surely it is unconstitutional to impose a complete lawmaking regime upon an entire State, by dictating that all pesticide laws be promulgated at the State level using State branches of government, and that no lawmaking occur at the local level.

It is true that a bare majority of the Court in *FERC* sustained the entire PURPA Act, including certain procedural requirements, stating that:

Congress could have pre-empted the field . . . ; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards. . . .

. . . .

[Turning to certain procedural requirements PURPA imposes upon state regulatory agencies, the Court then stated:] If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field – and we hold today that it can – there is nothing unconstitutional about Congress' requiring certain *procedural minima* as that body goes about undertaking its tasks.

*FERC*, 456 U.S. at 765, 771 (emphasis added). Although the majority felt that the imposition of certain "procedural minima" would not run afoul of the Constitution, surely they did not intend that even a complete supplantation of a State's lawmaking procedures (which is the result of the Wisconsin Supreme Court's decision) would be upheld simply because Congress could have pre-empted the entire field. For even the majority in *FERC* and in *Garcia* acknowledged that certain intrusions into state sovereignty could not be justified regardless of Congress' authority to preempt the entire field. See *FERC*, 456 U.S. at 742 n.32 (acknowledging that Congress may not 'dictate the agendas and meeting places of state legislatures'); *Garcia*, 459 U.S. at 547, 556 (admitting that there are limits on the Federal Government's power to interfere with state functions, and citing *Coyle v. Oklahoma*, discussed *infra*).

Indeed, none of the Justices have ever suggested that *Coyle v. Oklahoma*, 221 U.S. 559 (1911), is other than good law. In that case, this Court held that Congress, in the exercise of its power to admit States to the Union, could not condition such admission on federal control over the location of a state's capital. It was no argument that Congress could have refused to admit the State of Oklahoma at all, and thus it could go less far and admit the State on any condition. See *Coyle*, 221 U.S. at 565. Rather, the Court stated:

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another . . . are essentially and peculiarly state powers.

. . . .

. . . The legislation in the Oklahoma enabling act relating to the location of the capital of the State, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new States. [No such implicit power exists].

*Coyle*, 221 U.S. at 565, 574. Therefore, at least where certain fundamental intrusions into State sovereignty are involved, it is no argument that because Congress could have denied Statehood altogether (*Coyle*), or preempted the entire field (the case at bar), it may "go less far" and grant Statehood, or allow State regulation, upon any conditions whatsoever. Although this "go less far" argument has commanded the majority of this Court in decisions like *FERC* involving lesser intrusions into State sovereignty, this Court has never applied it in the context of



the most severe invasions of State authority such as occurred in *Coyle*. And, as noted above, the *FERC* and *Garcia* majorities themselves acknowledged that there are limits to federal encroachment on state powers.

Amici States contend that the intrusion into State sovereignty that results from the Wisconsin Supreme Court's decision is even more severe than the intrusion condemned in *Coyle*. For while dictating the location of a State's capital is admittedly a significant interference with the sovereign authority of a State to govern itself, there is no intrusion (except geographically) into the State's ability to decide how best to structure its lawmaking institutions. At worst, lawmakers, the governor, and lobbyists are forced to travel to a certain place, and buildings to house the branches of government must be built there, but the institutional structure is still left to the decision of the State. In our case, however, a most significant aspect of the decisionmaking structure of State government is dictated by Congress. The States are being precluded from delegating certain regulatory responsibilities to local governments, and are thereby forced to legislate in the entire area of pesticide use through state organs of government. The intrusion into State sovereignty here seems indubitably far greater than that found impermissible in *Coyle*.

There need be no fear by those in the *Garcia* majority that a recognition of State sovereign authority in this case would lead to the return of *Usery*, for this case, like *Coyle*, involves a peculiarly intrusive incursion on State governmental processes, not found in most federal legislation. And nothing in a decision restricting federal interference with state institutional design would prevent the federal

government from protecting individual rights pursuant to other Constitutional provisions. For example, a State's sovereign decision to allow only those cities that have a white majority population to coregulate would obviously have to yield to the equal protection clause.

In conclusion, the Wisconsin Supreme Court's decision violates the Tenth Amendment or general principles of federalism embodied in the Constitution by depriving States of their sovereign authority to choose to delegate lawmaking power over pesticide use to their local units of government.

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## CONCLUSION

For the foregoing reasons, we respectfully request that the decision of the Wisconsin Supreme Court be reversed.

Dated: Honolulu, Hawaii, February 28, 1991.

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## INTEREST OF THE AMICUS CURIAE

Professional lawn care is a \$1.9 billion industry which serves nearly 10 million customers annually. The Professional Lawn Care Association of America ("PLCAA") is an association of 1,350 entities that offer lawn care services. PLCAA members range from national companies, such as Chemlawn Services Corp. and TruGreen Corp., to small local businesses, which provide services including application of fertilizers and weed, insect, and disease control materials, collectively known as pesticides.

The PLCAA has previously litigated the question of preemption of local ordinances by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), see *Professional Lawn Care Ass'n v. Milford*, 909 F.2d 929 (6th Cir. 1990), petition for writ of cert. pending, No. 90-382, and it submits this brief in support of respondents and in support of the ruling by the Sixth Circuit that FIFRA preempts all local regulation of pesticide use. See *Professional Lawn Care Ass'n v. Milford*, *supra*.<sup>1</sup>

## THE LIKELY IMPACT OF LOCAL REGULATION OF PESTICIDES

There are approximately 83,000 units of local government in the United States. Petitioners contend that each of those units should be permitted to enact and enforce regulations governing pesticide use, without regard to the regulations already enacted and enforced at the federal and state levels.

In considering the 1972 amendments to FIFRA at issue in this case, Congress clearly foresaw that local regulation of pesticide use would be inconsistent, burdensome, and unwarranted. See discussion *infra* at pp. 24-27. Reference to existing local ordinances demonstrates, without exaggeration, the detrimental impact on an entire industry

<sup>1</sup> Written consents to the filing of this *amicus* brief, among others, have been obtained from all parties and filed with the Court.

which will result from unrestrained local regulation of pesticide use.

#### A. The Potential for Non-Uniform Local Regulation

Local pesticide use ordinances have taken sharply different forms. The Casey ordinance mandates that a permit be obtained before pesticides may be applied and requires that placards be posted on property before application and be maintained for six months; violations are subject to forfeiture of up to \$5,000. Pet. App. II C6-16. Other ordinances require registration, pre-application notice and post-application posting of placards. *Professional Lawn Care Ass'n v. Milford*, 909 F.2d 929 (6th Cir. 1990); *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987). One ordinance has prohibited certain applications, *People, ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984); another prohibits "any commercial spraying of herbicides for non-agricultural uses unless this spraying is first approved by a Town Meeting vote." *Central Maine Power Co. v. Lebanon*, 571 A.2d 1189, 1190-91 (Me. 1990).

Even ordinances which have the same purpose can impose different requirements. For example, the posting provisions of the Casey ordinance require the placard to state "WARNING—AREA TREATED WITH PESTICIDE" in one-inch block letters. See Pet. App. II C14. The posting provisions of the *Milford* ordinance, on the other hand, require placards to state "Chemically Treated Lawn—Keep Children and Pets Off for 72 Hours." 909 F.2d at 930.

The threat of non-uniformity is especially great in urban areas, where applicators would be subject to numerous different local ordinances. The Chicago area, which encompasses about 270 units of local government, is illustrative. Within a 30-mile radius, six local governments have recently enacted ordinances regulating pesticide use in dramatically different ways.

Two Chicago-area ordinances prohibit "custom application of pesticides," require commercial applicators to ob-

tain a license and file a \$5,000 performance bond before applying non-pesticide substances, and impose \$100 to \$500 fines for violations. City of Highland Park Code of Ordinances, ch. 99; Village of Lincolnshire Ordinances § 4-2B-1 *et seq.* Another ordinance adopts the Illinois Lawn Care Products Application and Notice Act and imposes \$50 and \$100 fines for violations. Hoffman Estates Municipal Code § 6-2-1-HE-16-103-A, B.

In Aurora, Illinois, commercial applicators must obtain a license, provide specified information to customers, give written notice to certain adjoining property owners, and place 4" by 5" placards on treated property. Placards must be white with dark lettering, state "LAWN CARE APPLICATION—STAY OFF GRASS UNTIL DRY—FOR MORE INFORMATION CONTACT:" in block letters at least 3/8 inch tall, and be rain resistant for two days. One placard must be posted for each 75 feet of frontage of the property. See City of Aurora Ordinance No. 090-59, § 21-32 *et seq.*

The Village of Schaumburg also requires licenses, and when outdoor applications are made, certain information must be given to the property owner and placards must be posted for at least 24 hours after the application. The placards must be 4" by 5" and rain resistant for 24 hours, and must identify the date of the application and state "Please Stay Off the Grass Until Dry." Violations are punishable by fines up to \$500. See Schaumburg Village Code §§ 16-5 *et seq.*

Finally, in the Village of Oak Park commercial applicators must obtain licenses and maintain an outdoor applications log stating the applicator's name and telephone number, the date and location of the treatment, and the name of the pesticide applied, along with its "concentration of active ingredients." Placards must be left on treated property for 72 hours, with one placard posted for each 100 feet of frontage. Placards must be yellow with black lettering, must be between 4" by 4" and 6" by 6" in size and rain resistant for 72 hours, and must state "PLEASE



STAY OFF" in one-inch block letters and "PESTICIDES APPLIED" in three-quarter-inch block letters. Violations are punishable by fines of up to \$500. See Oak Park Village Code § 20-10-1 *et seq.*<sup>2</sup>

In short, local ordinances have imposed a variety of license and permit criteria, prohibitions, posting and notice requirements, and penalties. These ordinances reflect the lack of uniformity which would occur, on a national basis, if local regulation of pesticide use were permitted.

## B. The Potential Cost of Local Regulation

The likely cost of local regulation is considerable—for most companies, prohibitive.<sup>3</sup> That cost arises from three common provisions of local ordinances: permit or license fees; posting and notice requirements; and penalties. Moreover, the cost would be borne by national companies and local companies alike, and undoubtedly would be passed on, at least in part, to consumers.

### 1. Permit, License, and Registration Costs

The Casey ordinance aptly demonstrates permit and licensing costs. An applicant for a permit must submit a \$25 processing fee. Pet. App. II, C14. A permit applies only to treatment of a "single defined area" within the town, so that different permits must be obtained for each contemplated application. *Id.*, C7. Furthermore, if a customer requires multiple treatments, which would extend over more than 60 days, multiple permits must be obtained. *Id.* As such, any commercial applicator seeking to serve multiple customers in Casey whose properties are

<sup>2</sup> The Aurora, Schaumburg, and Oak Park ordinances are set forth in the Statutory Compilation submitted by amici Village of Milford, *et al.*, at 32-41, 44-58.

<sup>3</sup> According to *Lawn Care Industry's* 1989 State of the Industry Report, only seven percent of professional lawn care firms had revenues of more than \$1 million in 1988. Eighty-three percent of such firms had revenues of less than \$500,000 in 1988, and 31 percent had revenues of less than \$100,000.

covered by the ordinance would likely have to pay multiple processing fees.

In addition, applicants must provide voluminous information, such as an inventory of pesticides to be used, a statement of why a pesticide application is preferable to alternative methods of treatment, and discussion of the status of pesticides to be applied and any chemical alternatives. See Pet. App. II, C7-11. The costs of compliance with these requirements will be extensive.

Projected on a national basis, license costs alone could amount to millions of dollars. If half of the 83,000 units of local government enacted ordinances requiring a \$25 fee, and four applicators per unit paid such fees, that cost alone would exceed \$4 million annually.

### 2. Posting and Notice Requirements

Compliance with posting and notice requirements, too, will involve significant costs. Such requirements variously obligate companies to obtain special placards, to post such placards before and after treatments, and to monitor such placards to ensure that they remain on the property for specified periods. The requirements do not permit any "economies of scale," since different ordinances require differently worded placards of different sizes and colors.

The circumstance of Chemlawn, which provides lawn care services to 1.3 million customers, illustrates the potential cost. If Chemlawn were required to post one placard on the property of each of its customers, for each of its five annual applications, Chemlawn would have to purchase more than 6 million specially sized, colored, worded, and laminated placards. That amount would be multiplied if, as some ordinances mandate, more than one placard must be posted on treated property. On an industry-wide basis, local posting regulations could require the purchase of tens of millions of placards annually.

The costs of complying with notice requirements and the costs of monitoring placards are more difficult to estimate but are no less real. Oral and written notice, and

monitoring of placards, will require significant employee time and expense.

### 3. Penalty Costs

Penalties for non-compliance with local ordinances range from \$50 per violation to the draconian \$5,000 forfeiture provision included in the Casey ordinance. If local ordinances are sanctioned by this Court, it is reasonable to assume that even companies attempting to diligently comply with a patch-work of regulations may run afoul of the minutiae contained in local ordinances. If only half of the 83,000 units of local government enacted ordinances, and such units each levied only \$500 in fines each year, the cost would amount to \$20 million.

### C. The Potential for Duplicative Regulation

Local pesticide ordinances clearly may result in duplicative regulation. Many states, pursuant to FIFRA, have enacted posting and notice regulations. See *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2d Cir. 1989) (discussing New York state statute). Such regulations also have been enacted by counties, see *Maryland Pest Control Ass'n v. Montgomery County*, *supra*, by cities, see *COPARR, Ltd. v. Boulder*, 735 F. Supp. 363 (D. Colo. 1989), by towns such as Casey, and by villages, see *Professional Lawn Care Ass'n v. Milford*, *supra*.

It is not unlikely that, if local regulation is permitted, independent posting and notice regulations could be imposed at the state, county, and city, township, or village levels.<sup>4</sup> Applicators could be required to post multiple differently sized, colored, and worded signs, and to provide notice in different forms and of different scope, for each

<sup>4</sup> The briefs of petitioners and supporting amici display disdain for the regulatory abilities of the states, and thus indicate that local governments would seek to impose their own posting and notice ordinances notwithstanding state regulation of the same area. See Pet. Br., at 69; NIMLO Br., at 5; Br. of Conservation Law Foundation, *et al.*, at 33-35.

application to a single parcel of property. The potential for duplicative regulation is obvious.

## I. SUMMARY OF ARGUMENT

FIFRA creates a comprehensive framework for the regulation of pesticides. To ensure adequate regulation, while avoiding unnecessary and burdensome additional regulation, Congress deliberately confined regulatory authority over pesticide use to the federal government and the states, and denied such authority to local governments. The language and structure of FIFRA make it clear that Congress sought to preclude local regulation of pesticide use, and the statute's legislative history confirms Congress' preemptive intent. As such, this Court should rule that FIFRA preempts *all* local regulation of pesticide use.

## II. ARGUMENT

### A. The Regulatory Scheme Created By FIFRA Comprehensively Regulates Pesticide Use

FIFRA was enacted in 1947 to "replace and expand the protection" afforded by the Insecticide Act of 1910, which was deemed "inadequate" due to development and use of new pest control products. See H.R. Rep. No. 313, 80th Cong., 2d Sess., *reprinted* in 1947 U.S. Code Cong. Serv. 1200-01. However, "[a]s first enacted, FIFRA was primarily a licensing and labeling statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984).

In 1972, Congress enacted amendments designed to "completely revise[]" FIFRA. S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted* in 1972 U.S. Code Cong. & Admin. News 3993. This Court summarized the history and effect of the amendments as follows:

Because of mounting public concern about the safety of pesticides and their effect on the environment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest, . . . Congress undertook a comprehen-

sive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972 . . . . *The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute . . . .* As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority. (emphasis added)

*Ruckelshaus v. Monsanto Co.*, 467 U.S. at 991-92. See H.R. Rep. No. 511, 92d Cong., 1st Sess. at 1 (1971) (amendments intended "to change FIFRA from a labeling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution, and use of pesticides.").

The 1972 amendments achieved FIFRA's transformation into a "comprehensive regulatory statute" by, *inter alia*, adding "a number of innovations to direct and strengthen federal control over pesticides." *Organized Migrants in Community Action, Inc. v. Brennan*, 520 F.2d 1161, 1165 (D.C. Cir. 1975). FIFRA now affords the Environmental Protection Agency ("EPA") far-reaching regulatory and supervisory authority over the use of pesticides and analogous chemical substances, see 7 U.S.C. § 136 *et seq.*, and the EPA has promulgated extensive regulations in furtherance of this authority. See 40 C.F.R. §§ 152-173 (1988).

The EPA interprets its duty to regulate pesticide "use" broadly. In July 1988, for example, the EPA proposed changes to its regulations governing worker protection from agricultural pesticides. See 53 Fed. Reg. 25970 (1988) (to be codified at 40 C.F.R. §§ 156 and 170). The proposed regulation specifies when notification is required, whether the warning must be oral or posted, and what language or symbols the warning must contain. In the proposed regulation, the EPA defines "use" as follows:

The regulation incorporates a definition of "use" which covers numerous activities in addition to ap-

plication of pesticides, all of which the Agency has determined are necessary steps to assure the safe use of pesticides and the prevention of unreasonable adverse effects on workers [§ 170.9(a)]. These activities occur prior to application, during application, and after application. This definition of "use" includes, but is not limited to, application, allowing or arranging for application, making necessary preparations for application, supervising application, and taking any required post-application actions.

53 Fed. Reg. at 25979.

Under the FIFRA scheme the broad regulatory authority of the federal government does not stand alone. Rather, FIFRA expressly contemplates and authorizes additional regulation at the state level. The statute states:

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v.

FIFRA's authorization of state regulation of "sale or use" of pesticides confers extensive powers upon states, which they have fully exercised. States have enacted numerous statutes regulating pesticides and pesticide applicators,<sup>5</sup> as well as extensive administrative regulations governing pesticide use.

<sup>5</sup> Ala. Code § 2-27-1 *et seq.* (1990); Alaska Stat. § 46.03.320 (1990); Ariz. Rev. Stat. Ann. § 3-341 *et seq.* (1989); *id.* § 3-361 *et seq.*; *id.* § 32-2301 *et seq.*; Ark. Stat. Ann. § 2-16-401, *et seq.* (1990); *id.* § 17-30-101 *et seq.*; *id.* § 20-20-201 *et seq.*; Cal. Bus. & Prof. Code § 8500, *et seq.* (Deering 1991); Cal. Food & Agric. Code § 11401, *et seq.* (Deering 1990); *id.* § 12751 *et seq.*; *id.* 13141 *et seq.*; *id.* § 14001 *et seq.*; *id.* § 15201 *et*



As of August, 1989, 49 states had EPA-approved pesticide applicator certification programs and 48 states had entered into cooperative enforcement programs. In 1988, 992,920 private applicators and 295,798 commercial applicators were certified to use or supervise the use of restricted use pesticides in the United States, four territories and 11 Indian tribes. In 1990, the total cost of state en-

seq.; Colo. Rev. Stat. § 35-9-101 et seq. (1990); id. § 35-10-101 et seq.; Conn. Gen. Stat. § 22a-46 et seq. (1989); Del. Code Ann. tit. 3, § 1201 et seq. (1990); Fla. Stat. § 482.011 et seq. (1989); id. § 487.011 et seq.; Ga. Code Ann. § 2-7-50 et seq. (1990); id. § 2-7-90 et seq.; id. § 43-45-1 et seq.; Haw. Rev. Stat. § 149A-2 et seq. (1990); id. § 460J-1 et seq.; Idaho Code § 22-3401 et seq. (1990); Ill. Rev. Stat. ch. 5, para. 801 et seq. (1988); id. ch. 11 1/2, para. 2201 et seq.; Ind. Code Ann. § 15-3-3.5-1 et seq. (Burns 1990); id. § 15-5-3.6-1 et seq.; Iowa Code § 206.1 et seq. (1989); Kan. Stat. Ann. § 2-2438 et seq. (1989); id. § 2-2348a et seq.; Ky. Rev. Stat. Ann. § 217.541 et seq. (Baldwin 1991); id. § 217B.010 et seq.; La. Rev. Stat. Ann. § 3:3201 et seq. (West 1990); Me. Rev. Stat. Ann. tit. 7, § 601 et seq. (1989); id. tit. 22, § 1471A et seq.; Md. Agric. Code Ann. § 5-101 et seq. (1989); id. § 5-201 et seq.; Mass. Ann. Laws ch. 132B, § 1 et seq. (Law. Co-op 1990); Mich. Comp. Laws § 286.551 et seq. (1990); Minn. Stat. § 18B.01 et seq. (1990); Miss. Code Ann. § 69-23-1 et seq. (1990); id. § 69-23-101 et seq.; Mo. Rev. Stat. § 263.269 et seq. (1989); id. § 281.101 et seq.; Mont. Code Ann. § 80-8-101 et seq. (1989); Neb. Rev. Stat. § 2-2601 et seq. (1989); Nev. Rev. Stat. § 555.2605 et seq. (1989); id. § 586.010 et seq.; N.H. Rev. Stat. Ann. § 430:28 et seq. (1989); N.J. Rev. Stat. § 13:1F-1 et seq. (1989); N.M. Stat. Ann. § 76-4-1 et seq. (1990); N.Y. Env'tl. Conserv. Law § 33-0101 et seq. (Consol. 1991); N.Y. Pub. Health Law § 1601 et seq. (Consol. 1991); N.C. Gen. Stat. § 143-434 et seq. (1990); id. § 106-65.22 et seq.; N.D. Cent. Code § 4-35-01 et seq. (1989); id. § 19-18-01 et seq.; Ohio Rev. Code Ann. § 921.01, et seq. (Baldwin 1990); Okla. Stat. tit. 2, § 3-61 et seq. (1989); id. tit. 2, § 3-81 et seq.; Or. Rev. Stat. § 634.006 et seq. (1989); 3 Pa. Cons. Stat. § 111.21 et seq. (1989); R.I. Gen. Laws § 23-25-1 et seq. (1989); S.C. Code Ann. § 46-13-10 et seq. (Law. Co-op. 1990); S.D. Codified Laws Ann. § 38-20A-1 et seq. (1990); id. § 38-21-14 et seq.; Tenn. Code Ann. § 43-8-101 et seq. (1990); id. § 62-21-101 et seq.; Tex. Agric. Code Ann. § 76.001 et seq. (Vernon 1989); id. § 135b-6; Utah Code Ann. § 4-14-1 et seq. (1990); Vt. Stat. Ann. tit. 6 § 911, et seq. (1989); id. tit. 6, § 1101 et seq.; Va. Code Ann. § 3.1-249.27 et seq. (1990); Wash. Rev. Code § 15.58.010 et seq. (1990); id. § 17.21.010 et seq.; W. Va. Code § 19-16A-1 et seq. (1990); Wis. Stat. § 9467 et seq. (1988); Wyo. Stat. § 35-7-350 et seq. (1990).

forcement, certification, and training programs was projected to reach more than \$29.5 million.<sup>6</sup>

Moreover, 15 states recently have enacted statutes or issued regulations requiring, on a state-wide basis, varying forms of notice and posting in connection with pesticide applications.<sup>7</sup> This type of regulation, too, is within the states' authority under FIFRA. See *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d at 116-17.

In short, FIFRA establishes a federal-state partnership which extensively regulates pesticide use at two levels. FIFRA thus has created "an elaborate framework for the regulation of pesticide use in the United States." *Love v. Thomas*, 838 F.2d 1059, 1061 (9th Cir.), amended, 858 F.2d 1347 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989).

*Amici* argue that posting and notice ordinances constitute "public notice" regulation which is outside the purview of FIFRA. *Br. of Village of Milford, et al.*, at 2. This argument has been rejected by lower courts, see *Professional Lawn Care Ass'n v. Milford*, 909 F.2d at 932, and should be rejected by this Court as well. The comprehensive scope of FIFRA is such that the types of regulation attempted by Casey and other local governments can be,

<sup>6</sup> See Association of American Pesticide Control Officials, *Financial Survey of the Cooperative EPA and State Pesticide Regulatory and Educational Programs* (August 1989).

<sup>7</sup> See Colo. Rev. Stat. § 35-10-101 et seq. (1991); Conn. Gen. Stat. § 22a-66a et seq. (1991); Conn. Agencies Regs. § 22a-66a-1 et seq. (1991); Fla. Admin. Code Ann. r. 10D-55.145 et seq. (1990); Ill. Rev. Stat. ch. 5, para. 851 et seq. (1989 Supp.); Ind. Admin. Code tit. 357, r. 1-5 et seq. (1990); Iowa Admin. Code r. 21-45.22 (206) et seq. (1990); Code of Maine Rules Vol. I, 01-026 ch. 22 § 1 et seq. (1990); Md. Regs. Code tit. 15, § 15.05.10.10 et seq. (1990); Minn. Stat. § 18B.01 et seq. (1990); N.H. Code Admin. R. Pes 508.01 et seq. (1990); N.J. Admin. Code tit. 7, § 7:30-9.11 et seq. (1990); N.Y. Env'tl. Conserv. Law § 33-1001 et seq. (1990); 6 N.Y. Comp. Codes R. & Regs. tit. 6 § 325 et seq. (1987); 7 Pa. Code § 128.1 et seq. (1990); (1990); Lawn Care Rule T of the Rhode Island Pesticide Control Act, EVM-165-87, Department of Environmental Management (March 10, 1987); West Virginia Procedural Rule 61-12E, Department of Agriculture (Dec. 12, 1990); West Virginia Legislative Rule 61-12A, Department of Agriculture (Oct. 3, 1990).

and have been, achieved by the federal government and by states working within the two-tier FIFRA regulatory framework. Local ordinances simply are not needed to supplement the FIFRA regulatory scheme.<sup>8</sup>

#### B. FIFRA Preempts Local Ordinances Regulating Pesticide Use.

"[T]he question whether a certain state action is preempted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.' " . . . To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute.

*Ingersoll-Rand Co. v. McClendon*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 478, 482 (1990) (citations omitted). Here, the language, structure, and purpose of FIFRA reveal that Congress intended to preempt local ordinances regulating pesticides.<sup>9</sup>

<sup>8</sup> This fact has been recognized by the National Association of State Departments of Agriculture ("NASDA"). A NASDA resolution adopted on September 19, 1984 states that FIFRA

clearly establishes a federal-state partnership in the administration and enforcement of pesticide regulations. Such a two-party relationship currently exists and is working extremely well for our country. Recent efforts in many states by county, municipal, township and other local governments in considering local pesticide ordinances could threaten the historic federal-state relationship and create an unending hodge-podge of pesticide regulations which would totally destroy uniform pesticide regulation in the country.

<sup>9</sup> Petitioners cite the assumption against preemption of police powers in arguing that the Casey ordinance should be upheld. See Pet. Br., at 23-27. It is unclear whether the assumption applies here, since FIFRA does not preempt state police powers, but only local regulation beyond that imposed by states and the federal government. In any event, even when the assumption applies, preemption is compelled "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

#### 1. Congress' Intent To Preempt Local Ordinances Regulating The Use Of Pesticides Is Evident From The Express Language Of FIFRA

Through FIFRA Congress created a comprehensive regulatory scheme governing pesticides. As an integral part of this scheme, it defined how regulatory authority is to be allocated. While Congress could have had the federal government occupy the field of pesticide regulation, it did not do so; instead, it vested some regulatory authority in the states. The statute thus provides: "A State may regulate the sale or use of any federal registered pesticide or device in the State . . . ." 7 U.S.C. § 136v(a).

"Savings" clauses, such as Section 136v(a), should be construed so as to avoid serious interference with comprehensive regulatory schemes. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987). Here, the fact that Congress saw fit to authorize state regulation of the sale and use of pesticides confirms its intent to create a comprehensive scheme in which authority to enact regulations is limited to the federal government and "States."<sup>10</sup> Section 136v(a) has meaning only if it is read as carving out from the federal domain and conferring upon "States" a specific sphere of authority over pesticides.<sup>11</sup> As such, the proper construction of "States" is

<sup>10</sup> This type of analysis was applied in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273 (1989). In examining state liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), this Court noted 42 U.S.C. § 9607(d)(2), which provides a limited exemption of state and local government liability under CERCLA, and explained: "This section is, needless to say, an explicit recognition of the potential liability of States under this statute; Congress need not exempt States from liability unless they would otherwise be liable." 491 U.S. at \_\_\_, 109 S. Ct. at 2278-79. Here, Congress need not have authorized state regulation, through Section 136v(a), unless such regulation otherwise would have been preempted under FIFRA.

<sup>11</sup> The Solicitor General contends that Section 136v(a)'s authorization of state regulation, and omission to authorize local regulation, has no preemptive meaning. *United States Br.*, at 9-10, 13-14. That conclusion

crucial to determining whether, as part of the comprehensive FIFRA scheme, Congress intended to preclude local regulation of pesticide use.

It is therefore highly significant that FIFRA defines "State" without including political subdivisions. The definition provides: "The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." 7 U.S.C. § 136(aa).

"It is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484 (1987); see *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979).<sup>12</sup> Because FIFRA's definition of "State" excludes local governments, the use of "State" in Section 136v(a) cannot be construed to encompass local governments. As such, Section 136v(a) clearly withholds regulatory authority from local governments, and evinces Congress' intent to preclude the regulation of pesticide use by local governments.

Other provisions of FIFRA, which expressly refer to political subdivisions or local authorities as distinct from states, reveal that Congress' exclusion of local regulatory authority was intentional. See 7 U.S.C. § 136f(b); *id.*

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violates the rule of statutory construction that all language has independent meaning and purpose. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Moreover, that conclusion would mean that the congressional activity addressing whether local regulation should be authorized, see discussion *infra* at pp. 19-24, was an utterly empty exercise.

<sup>12</sup> See also *Philadelphia v. Stepan Chemical Co.*, 713 F. Supp. 1484, 1488 (E.D. Pa. 1989) ("CERCLA's definition of the term 'state' does not include the word 'municipality.' The entities that are included - states, the District of Columbia, Puerto Rico, Guam, Samoa, the Virgin Islands, the Marianas, and United States territories and possessions - differ so vastly from villages, towns, boroughs, townships, counties, and cities as to be words of exclusion.").

§ 136r(b); *id.* § 136t(b).<sup>13</sup> Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted).

If "State" as used in FIFRA were intended to include local governments, then Congress' explicit references to political subdivisions, as separate from "States," would be unnecessary. That result would violate "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). The references to "States" and political subdivisions as distinct entities make it clear that Congress differentiated between states and political subdivisions when it enacted FIFRA.

This is not a case, then, where preemptive intent is based upon statutory "silence." *United States Br.*, at 10. Congress explicitly established a comprehensive scheme and explicitly gave "States," but not local governments, regulatory authority over pesticide use. Congress also explicitly distinguished between "States" and their political subdivisions, and when a limited role for political subdivisions was intended, the statute so provided. The language and structure of FIFRA plainly express an intent that local regulation of pesticide use be precluded.

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<sup>13</sup> Section 136t(b) states that the EPA Administrator "shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this subchapter, and in securing uniformity of regulations." Amici contend that this language reveals that local governments possess regulatory authority under FIFRA. *Br. of States of Hawaii, et al.*, at 11. The ability to assist "in securing uniformity of regulations" is a far cry from the ability to enact regulations in the first instance, however. Moreover, if Section 136t(b) reveals that local governments have an independent ability to enact pesticide regulations, then it necessarily also reveals independent regulatory authority by "any other Federal agency"—a result that is clearly contrary to Congress' intent to centralize regulatory authority in the EPA.



The arguments against this analysis are unavailing. For example, petitioners argue that the definition of "State" should not be read as excluding local governments because "Congress could have expressly excluded local governments from the definition simply by stating that the term 'does not include their political subdivisions'" but did not do so. Pet. Br., at 34-35. This argument is contrary to this Court's analysis of statutory definitions, and would require Congress to define not only what a term means but also what it does not. This Court should reject imposing such an absurd burden upon Congress.

Petitioners also contend that construing "State" to exclude local governments would yield an "absurd result" as applied to 7 U.S.C. § 136v(b), in that local governments would be permitted to regulate pesticide labeling and packaging when "States" cannot. Pet. Br., at 35-36. This "absurd result" is illusory because Section 136v(b) must be read in conjunction with Section 136v(a). Section 136v(a) authorizes state regulation of the "sale or use" of pesticides; Section 136v(b) then restricts that authorization by precluding state regulation of labeling and packaging. See *National Agricultural Chemicals Ass'n v. Rominger*, 500 F. Supp. 465, 470-71 (E.D. Cal. 1980) (7 U.S.C. § 136v "reveals both a broad grant of power to the states and a limitation on the exercise of that power."). This construction is confirmed by the use of "Such State" in Section 136v(b), which plainly refers to "State" as used in Section 136v(a). Because they are not "States," local governments are not authorized to regulate *any* aspect of the "sale or use" of pesticides, including "labeling or packaging".

The Solicitor notes FIFRA's definition of "States," but argues that "[b]ecause local governments are subordinate entities of the State itself, . . . this provision adds nothing to the analysis." United States Br., at 11. The significance of the definition cannot be so easily discounted, however. FIFRA's definition of "States" stands in sharp contrast to many federal statutes which define "State" to include

local subdivisions.<sup>14</sup> See *Ingersoll-Rand Co. v. McClendon*, \_\_\_ U.S. at \_\_\_, 111 S. Ct. at 484 (discussing Congress' varying definitions of "State" in ERISA). These statutes demonstrate that when Congress intends the word "State" to include local governments, it defines "State" accordingly. It thus is unreasonable to conclude that Congress—notwithstanding its own definition—intended the word "State" to include local governments for purposes of FIFRA.

The Solicitor General also argues that FIFRA's provisions which envision a limited role for local governments reflect an intent that local governments share in the regulatory authority afforded "States." United States Br., at 12 (citing 7 U.S.C. §§ 136f(b), 136u(a)(1)). This assertion is unpersuasive. Section 136f(b) vests authority to inspect records in "any State or political subdivision" and reveals that Congress viewed those entities as separate; the inspection authority given local governments by Section 136f(b) thus does not equate with the general enforcement authority which Section 136u(a)(1) gives *only* to "States." Moreover, as the Solicitor recognizes, United States Br., at 12, both Section 136f(b) and Section 136u(a)(1) deal with *enforcement* of regulations, and thus are irrelevant to ascertaining authority to *enact* regulations. Simply put, Congress *was* willing to permit local governments a limited role in assisting in *enforcement* of federal and state regulations; it *was not* willing to yield to local governments the fundamentally distinct power to *enact* such regulations.

The Solicitor also cites 7 U.S.C. § 136i(a)(2)(A) in arguing that while Congress intended state-wide administration of applicator certification plans, it did not provide for state-wide administration of pesticide use regulation.

<sup>14</sup> For example, 15 U.S.C. § 1692a(8) defines "State" as "any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing." See also 10 U.S.C. § 2232(1); 15 U.S.C. § 1693a(10); *id.* § 3316(b)(2)(c)(i); 25 U.S.C. § 1742(2); *id.* § 1772a(2); 27 U.S.C. § 214(10); 29 U.S.C. § 1144(c)(2); 30 U.S.C. § 552; 42 U.S.C. § 4601(2).

United States Br., at 13. This argument proves nothing because the authority to "administer" regulations is entirely different from the authority to enact regulations.

Section 136i(a)(2) is worth noting, however, because in 1975 the EPA promulgated regulations pursuant to that section. See 40 Fed. Reg. 11,698 (1975). One proposed provision stated: "In the event that more than one State agency will be responsible for performing certain functions under the State plan, the plan shall identify which functions are to be performed by which agency and indicate how the program will be coordinated by the lead agency to ensure consistency of programs within the State." *Id.* at 2531. The EPA later substituted "governmental agency" for "State agency," and explained:

This change is made only to accommodate a State needing the assistance of local authorities in implementing and maintaining its certification programs, and provided that such assistance is uniform throughout the State and is totally responsive to State direction. *It is not the intention of the Act or these regulations to authorize political subdivisions below the State level to further regulate pesticides.*

40 Fed. Reg. at 11,700 (emphasis added).

The Solicitor contends that this EPA statement relates only to applicator certification matters. United States Br., at 22 n.20. That contention is belied by the language of the passage; the phrase "further regulate pesticides" clearly refers to regulation beyond the certification context. The Solicitor also states that "[t]o the extent that the EPA statement . . . is subject to a broader reading, the language could have been more precise; EPA's position is that local governments are not preempted from regulating pesticide use." *Id.* The 1975 EPA statement was not imprecise, however; it clearly articulated a position that local regulation of pesticide use was preempted by FIFRA. The EPA thus has not clarified an "imprecise" position, it has changed its position entirely. That change evidently was adopted in response to this case, and it is

not entitled to the deference of this Court because it is "wholly unsupported by regulations, rulings, or administrative practice" and is contrary to the EPA's prior position. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988). "[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983).

In summary, within FIFRA's comprehensive framework, Congress intended to permit regulation of pesticide use by the federal government and the states, but not by local governments. The language and structure of FIFRA thus demonstrate Congress' intent to preempt regulation of pesticide use by local governments.

## 2. The Legislative History Of FIFRA Confirms That Congress Intended To Preempt Local Ordinances Regulating The Use Of Pesticides.

The legislative history of the 1972 amendments to FIFRA begins with a presidential proposal introduced in the House of Representatives on February 10, 1971. See H.R. Rep. No. 511, 92d Cong., 1st Sess. at 12 (1971). The bill stated, *inter alia*: "nothing in this Act shall be construed as limiting the authority of a State or a political subdivision to regulate the sale or use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited under authority of this Act." The bill was assigned to the House Agriculture Committee, which held 17 public hearings, *id.* at 13, and reported a new bill, H.R. 10729, to the full House. *Id.* at 1.

H.R. 10729 deleted any reference to political subdivisions in the section authorizing states to regulate the sale or use of pesticides, and provided instead:

A State may regulate the sale or use of any pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act or restrict by license or permit the use of a pesticide registered for general use.

H.R. Rep. No. 511, *supra*, at 64. The Committee Report explained: "The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." *Id.* at 16. H.R. 10729 then passed the full House by a vote of 288-91. See 117 Cong. Rec. H10773-74 (daily ed. Nov. 9, 1971).

In the Senate, H.R. 10729 was referred to the Committee on Agriculture and Forestry. That Committee's Report stated:

The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the 50 States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities, whether towns, counties, villages or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis, and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides. (emphasis added)

S. Rep. No. 838, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4008.

H.R. 10729 was then referred to the Commerce Committee, which approved an amendment expressly authorizing local regulation of the sale or use of pesticides. The Committee Report stated:

While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that Committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA.

S. Rep. No. 970, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4092, 4111.<sup>15</sup>

Following an exchange of letters between the chairmen of the two Senate committees, it was agreed that the staffs of the two committees would confer. See 1972 U.S. Code Cong. & Admin. News at 4086-88. After weeks of meetings, a "Compromise Amendment in the Nature of a Substitute" was prepared. *Id.* at 4088-91. The compromise, which did not contain the provision authorizing local regulation, was agreed to by a majority of the Commerce Committee and by all members of the Agriculture and Forestry Committee. See *id.*; 118 Cong. Rec. S15889 (statement of Sen. Allen) (daily ed. Sept. 26, 1972).

On the Senate floor, the Commerce Committee amendments, including the provision authorizing local regulation, were offered. See 118 Cong. Rec. S15888 (daily ed. Sept. 26, 1972). Senator Talmadge, chairman of the Committee on Agriculture and Forestry, and Senator Allen, chairman of a key subcommittee, then offered the compromise as a substitute. See *id.* at S15888-89. With unanimous consent, Senator Allen inserted in the *Congressional Record* an ex-

<sup>15</sup> The Agriculture and Forestry Committee then filed a Supplemental Report reaffirming the Agriculture Committee's conclusion "that regulation by the Federal government and the 50 States should be sufficient and should preempt the field." See 1972 U.S. Code Cong. & Admin. News at 4023, 4026; see also *id.* at 4066.



cerpt from S. Rep. No. 838, which included the statement that the legislation "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." *Id.* at S15893. Senator Allen also submitted an "explanation of compromise substitute for the text of H.R. 10729," which made it clear that the Commerce Committee's amendment to grant local governments the authority to regulate pesticides had *not* been included in the compromise. *Id.* at S15895 ("Commerce Committee amendment[ ] . . . 10 (authority of local governments to regulate the use of pesticides) . . . [is] not included in the substitute."). The Senate approved the compromise by a vote of 71-0. *Id.* at S15900.

House and Senate members then met in conference to resolve the differences between the Senate and House bills. Since both bills were expressly understood to preclude local regulation of pesticides, that issue was not mentioned in the joint explanatory statement of the conference committee, *see* H. Con. Rep. 1540, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4130, or in the Senate Agriculture and Forestry Committee's statement on "differences between the Senate amendment to H.R. 10729 and the conference substitute therefor." 118 Cong. Rec. S16977-78 (daily ed. Oct. 5, 1972). Both Houses then approved the conference report. *Id.* at S16981; *id.* at H9798 (daily ed. Oct. 12, 1972).

This history affirms Congress' intent that FIFRA preclude local regulation of pesticide use. The rejection of the President's bill and the Commerce Committee's amendment, both of which included language expressly authorizing local regulation, "reveals a conscious decision by Congress" to eliminate such language. *Tennessee Valley Authority v. Hill*, 437 U.S. 15, 185 (1978); *see also Russell v. United States*, 464 U.S. 23-24. In addition, the operative committee reports—those of the House Agriculture Committee and the Senate Committee on Agriculture and Forestry—explicitly reject local regulation. These reports are "the authoritative source for finding the Leg-

islature's intent," *Garcia v. United States*, 469 U.S. 70, 76 (1984), which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186 (1969).<sup>16</sup>

The Solicitor argues that it is "entirely plausible" to conclude that the Senate committees "agreed to disagree on the issue of preemption of local regulation." *United States Br.*, at 19. Such a reading is belied by the facts: the Agriculture Committee version of the relevant provision was accepted; the Commerce Committee amendment authorizing local regulation was rejected; the full Senate was advised of that fact; and the Agriculture Committee's interpretation of the language as preempting local regulation was inserted in the *Congressional Record*. The disagreements between the two committees were not left unresolved, they were resolved in favor of the preemption position of the Senate Agriculture and Forestry Committee.

The concurring opinion in *Professional Lawn Care Ass'n v. Milford* aptly summarizes the analysis:

<sup>16</sup> Amici argue that the history is not clear because three cases have found that the history does not support preemption. *NIMLO Br.*, at 7. It is worth noting, however, that two of the cases cited—*COPARR, Ltd. v. Boulder*, 735 F. Supp. 363 (D. Colo. 1989), and *Central Maine Power Co. v. Lebanon*, 571 A.2d 1189 (Me. 1990)—simply adopt the analysis of the third case, *People, ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984). That analysis, moreover, is riddled with errors: it ignored the rule that a statutory definition of a term necessarily excludes unstated meanings of that term; it ignored the provisions of FIFRA which distinguish between "States" and local governments; it ignored the rejections of language which would have authorized local regulation; and it downplayed the significance of the relevant committee reports. Not surprisingly, two federal courts have concluded that *County of Mendocino* is "based on an untenable reading of the legislative record." *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d at 934 (quoting *County of Mendocino*, 204 Cal. Rptr. at 911, 683 P.2d at 1164 (Kaus, J., dissenting)); *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. at 111 n.2.

The appellants in this case argue that because the dispute over preemption of local regulatory authority was compromised by not specifically referring to this subject in the statute, the compromise was not designed to preempt traditional local police powers or to preempt the power of a state to distribute its regulatory authority between itself and its political subdivisions in any way it might see fit. . . . The argument might have been persuasive if the compromise had been limited to the local government issue, but such was not the case. There were numerous points of disagreement between the Senate committees, for example, and the compromise reached in the Senate was based on the Agriculture Committee's receding on some issues and the Commerce Committee's receding on others. The local government question was one on which the Commerce Committee gave way to the Agriculture Committee entirely, and when the Senate passed the compromise bill, it passed a bill that the [Agriculture] Committee had said, in its June 7 report, "should be understood as depriving . . . local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides."

909 F.2d at 939-40 (Nelson, J., concurring) (citation omitted).<sup>17</sup>

### 3. Congress' Decision to Preclude Local Regulation Was Based Upon Sound Legislative Judgments.

In the 1972 amendments to FIFRA Congress considered the question of local regulation of pesticide use, determined

<sup>17</sup> In any event, a dispute in the Senate cannot affect the position of the House as to its version of legislation, and here the preemptive intent of the House is stated plainly in the Report of the House Agriculture Committee. As one court recently noted, "[i]f the Senate and House histories conflict, the history of the body in which the enacted bill originated is normally more persuasive." *Dillard v. Harris*, 885 F.2d 1549, 1552 (11th Cir. 1989), cert. denied, \_\_\_ U.S. \_\_\_, 111 S. Ct. 210 (1990); see also *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956).

that such regulation should be precluded, and wrote the statute to reflect that decision. Congress had sound policy reasons for making such a judgment, and its purpose is relevant to the preemption analysis. *Ingersoll-Rand v. McClendon*, \_\_\_ U.S. at \_\_\_, 111 S. Ct. at 482.

The prevailing committee reports on the 1972 amendments concluded that regulation of pesticide use by local governments should be precluded for three reasons. First, the states and the federal government provide an adequate number of regulatory jurisdictions. Second, only the federal government and states have the resources and expertise to properly regulate the sale and use of pesticides. Third, the balkanization resulting from local regulation of pesticide use would constitute an extreme burden on interstate commerce. See H.R. Rep. No. 511, *supra*, at 16; S. Rep. No. 838, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4008.

The policy considerations underlying Congress' decision have been realized by the current state of pesticide regulation in the United States. Local regulation of pesticides is not necessary; as was discussed *supra*, the federal government and the states have extensively regulated pesticide use and have put into effect the same types of regulation now attempted by local governments. To the extent that local governments believe that additional regulation is needed, they can achieve such regulation through the states, within the FIFRA two-tier regulatory framework.

Congress also accurately foresaw that local governments would lack the expertise to properly regulate pesticides. Local regulations already have been imposed without benefit of the expertise necessary to regulate in a specialized area. The regulations at issue in *People, ex rel. Deukmejian v. County of Mendocino*, *supra*, and in *Central Maine Power Co. v. Lebanon*, *supra*, highlight that fact. In *County of Mendocino*, the "regulation" was an outright ban on aerial application of certain herbicides, imposed by an initiative approved by county voters. In *Lebanon*, the ordinance per-



mits the application of pesticides only if residents approve the application by a "Town Meeting" vote. Neither ordinance makes any pretense of basing pesticide regulation on regulatory expertise or scientific analysis.

Congress also correctly realized that local regulation of pesticides would be unduly burdensome. The local ordinances described above, which impose a welter of different prohibitions, permit and license criteria, posting and notice requirements, and penalties, have resulted in a patchwork quilt of regulation which creates substantial, and unnecessary, costs. If local regulation is permitted, the lack of uniformity and unnecessary cost will increase. Commercial applicators will be obligated to comply with the regulations of thousands of jurisdictions, each imposing varying duties, obligations, and placard criteria. As the Sixth Circuit found, allowing local regulation of pesticide use "would allow the uniformity and comprehensiveness Congress sought to establish through FIFRA to be lost in the muddle of thousands of local standards and regulations." *Professional Lawn Care Ass'n v. Milford*, 909 F.2d at 934.

In short, permitting local regulation would seriously undermine the policy decisions underlying the FIFRA regulatory framework. In that sense, this case is analogous to *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In *Ouellette*, this Court considered whether, under the comprehensive regulatory scheme created by the Clean Water Act, non-source states affected by pollution could regulate pollution sources. The Act expressly vested regulatory authority in the federal government and in source states, but also included a "savings clause" allowing additional regulation. Respondents invoked that clause in seeking to apply Vermont nuisance law to a source located in New York. *Id.* at 483-87.

This Court held Vermont law preempted, finding that "if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress." 479

U.S. at 493-94. The Court noted that permitting application of the laws of a non-source state would disrupt the "balance of interests" established by the comprehensive federal scheme, and would subject sources to a variety of different, and often vague, rules of conduct. *Id.* at 495-96. In view of these circumstances, this Court concluded:

It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.

Nothing in the Act gives each affected State this power to regulate discharges. The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by pollution. It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

*Id.* at 497.

In *Ouellette*, as here, the federal statute established a comprehensive "regulatory 'partnership'" between the federal government and the states. There, as here, another layer of regulation was sought to be imposed. There, as here, permitting such regulation would create "a chaotic regulatory structure" contrary to Congress' purpose in creating a comprehensive scheme.

This Court should follow the *Ouellette* analysis and reject local regulation of pesticide use. Congress had sound reasons for precluding such regulation, and it crafted FIFRA to achieve that goal. Due respect for congressional intent, and congressional efforts, requires a holding that FIFRA preempts local regulation of pesticide use.



#### 4. Preemption of Local Regulation Does Not Impair Fundamental Principles of Federalism.

Petitioners contend that construing FIFRA to preclude local regulation of pesticide use would violate "fundamental principles of federalism" embodied in the Tenth Amendment. Pet. Br., at 90-101. This argument should be rejected. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court held that Congress has the power to control the states in areas considered to be traditional state functions. Congress may prohibit the states from delegating to local governments the power to regulate, particularly where, as here, it concluded that uniform regulation was essential and that local governments could not adequately regulate in a given field.

Even if *Garcia* were to be reconsidered, this case is not the proper vehicle to do so.<sup>18</sup> FIFRA does not regulate states, it regulates private individuals and businesses. The Tenth Amendment does not prohibit Congress "from displacing state police power laws regulating private conduct." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981).

<sup>18</sup> While petitioners complain that preemption of local ordinances will prevent a state from delegating its power under FIFRA to local governments, that circumstance does not exist here. Petitioners have not cited any statute delegating Wisconsin's power under FIFRA to local governments; indeed, Wisconsin has enacted state-wide regulation of pesticide use. See Wis. Stat. §§ 94.67 - 94.71. Casey claims the power to regulate pursuant to a 1921 statute which gives Wisconsin municipalities "all the powers that the legislature could by any possibility confer upon" them. Pet. Br., at 95-96 n.33. This general grant does not constitute a delegation of FIFRA regulatory authority from Wisconsin to Casey, nor does it mean that Casey was acting with the power of the state when it enacted its ordinance. See *Community Communications Co., Inc. v. Boulder*, 455 U.S. 40, 54-56 (1982). Since Wisconsin has not delegated its authority under FIFRA to local governments, any federalism argument necessarily is based upon speculation. Essentially, petitioners ask this Court to render the kind of advisory opinion that has long been held inconsistent with the requirements of Article III of the Constitution; this Court should decline to do so.

Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result that has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution."

*National League of Cities v. Usery*, 426 U.S. 833, 840 (1976) (citations omitted).

Second, FIFRA does not impair state autonomy, nor does it command that states take any affirmative acts. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 288. Rather, FIFRA permits states to enact pesticide use regulations, and it permits states to delegate some or all of the authority to achieve enforcement of those regulations to local governments. The only prohibition effected by the statute is the prohibition of enactment of pesticide use regulations by local governments.

Congress clearly has the power to regulate pesticide use and to require regulatory uniformity. It also is beyond dispute that Congress has the power to prohibit all state and local regulation of pesticides. Here, Congress exercised its power in a narrower fashion, by permitting federal and state regulation while prohibiting additional, non-uniform regulation by thousands of units of local government. That decision does not violate the Tenth Amendment.<sup>19</sup>

The assertions of petitioners and amici, if accepted by this Court, would place a curious restriction on congress-

<sup>19</sup> See *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 765 (1982) ("Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme . . ."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 290 ("Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.").

sional power. In areas where Congress concluded that uniformity of regulation was needed to avoid burdens on commerce, but recognized that local conditions might make additional state-wide regulation advisable, it could not enact legislation which would achieve both goals. Rather, it would be forced either to forgo its first goal, and allow the burdens on commerce caused by extensive non-uniform regulation, or to forgo its second goal, and preempt all other regulation in the area despite its conclusion that additional regulation at the state level would be salutary.

As the Solicitor General has noted, such an approach "stands the Tenth Amendment on its head." United States Br., at 24 n.21. Petitioners' argument that principles of federalism are violated by preemption of local ordinances regulating pesticide use is without foundation and should be rejected by this Court.

### III. CONCLUSION

The comprehensive regulatory framework created by FIFRA, the plain language of the statute, and its legislative history all compel the conclusion that FIFRA preempts local regulation of pesticides. The decision of the Wisconsin Supreme Court should be affirmed by this Court.

Respectfully submitted,

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UNITED STATES OF AMERICA  
DISTRICT COURT OF SOUTHERN DISTRICT OF NEW YORK

JOHN J. RABINOWITZ AND EDWIN M. GARY,  
Defendants,

vs.  
UNITED STATES DEPARTMENT OF JUSTICE, and  
UNITED STATES ATTORNEY, DISTRICT OF SOUTHERN DISTRICT OF NEW YORK COALITION,  
Plaintiffs.

Case No. 100-CV-00000-00000

UNITED STATES OF AMERICA  
DISTRICT COURT OF SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES DEPARTMENT OF JUSTICE  
UNITED STATES ATTORNEY, DISTRICT OF SOUTHERN DISTRICT OF NEW YORK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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No. 89-1905

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WISCONSIN PUBLIC INTERVENOR AND TOWN OF CASEY,  
*Petitioner,*  
v.

RALPH MORTIER, and  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/TURF COALITION,  
*Respondents.*

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On Writ of Certiorari to the Wisconsin Supreme Court

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**BRIEF FOR *AMICUS CURIAE***  
**AMERICAN FARM BUREAU FEDERATION**  
**IN SUPPORT OF RESPONDENTS**

---

American Farm Bureau Federation (AFBF) hereby submits its brief *amicus curiae* in favor of the position of Respondents. Letters from the parties consenting to filing this brief *have been filed* with the Clerk of the Court per Supreme Court Rule 37.

**INTEREST OF THE *AMICUS CURIAE***

The American Farm Bureau Federation (AFBF) is a voluntary non-profit, general farm organization incorporated in 1920 pursuant to the laws of the State of Illinois. AFBF's purposes are to promote, protect and represent the business, economic, social and educational interests of farmers and ranchers across the United States and to develop agriculture. As the largest general farm organization in the nation, AFBF has member state Farm



Bureau organizations in all 50 states and Puerto Rico, representing 3.8 million member families. AFBF's farmer and rancher members produce virtually every kind of agricultural commodity produced in the United States.

Farm Bureau members have a direct and vital interest in the outcome of this case. Federally registered pesticides constitute an important and integral role in production agriculture by protecting crops from damage or destruction caused by pests and weeds.

Uniform pesticide regulation is essential for farmers and ranchers to maintain economically viable operations. Orderly and uniform regulation of pesticide use on farmlands is of paramount importance to producers whose farms and ranches often span more than one municipal, township, or county jurisdiction. Agricultural producers nationwide will be adversely affected by restrictive ordinances like that of the Town of Casey which impose significant and burdensome requirements on producers that make it difficult—if not impossible—to efficiently farm. To the extent such local ordinances would prohibit all pesticides, even though federally approved, producers would be unreasonably denied an important production tool.

Of perhaps even greater concern are the compliance problems created by multiple local ordinances that not only conflict with federal law but conflict with each other. Such a result would render unworkable the planning, managing and coordination of farming and ranching operations. Accordingly, Farm Bureau members have a strong interest in ensuring that their livelihoods are not subjected to the uncertainty and vulnerability that flows from regulatory schemes such as Casey's.

#### SUMMARY OF ARGUMENT

Through the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), Congress sought to provide a comprehensive pesticide regulatory system that balances

the risks and benefits of pesticides and makes registration, use, labeling and cancellation decisions on the basis of sound science. Furthermore, Congress clearly provided that there was to be a "uniformity of regulations" (7 U.S.C. 136t(b)) with respect to pesticides.

The Casey ordinance destroys the uniformity of the FIFRA regulatory system by establishing its own independent pesticide regulatory scheme.

The ordinance places exclusive control of pesticide use decisions with the Town Board. Rather than balancing risks and benefits, the Board can grant or deny pesticide use on any ground.

The issue in this case is whether FIFRA pre-empts the Town of Casey ordinance.

Federal law can pre-empt state or local law if Congress indicates an intention to occupy a given field, *Pacific Gas & Electric Co. v. State Energy Resources Conservation Dev. Commission*, 461 U.S. 1990 (1983) and local law seeks to regulate the same field. As an independent pesticide regulatory scheme, the Casey ordinance seeks to do at the local level what FIFRA does at the national level—regulating pesticides within its jurisdiction.

Federal law may also pre-empt local law if the local law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Casey ordinance: (1) allows pesticide use decisions to be made without reference to federal or state "risk-benefit" considerations; (2) allows decisions to be made on grounds that are not science based; and (3) makes it unduly burdensome for farmers, ranchers and other applicators to use or even apply for use of pesticides in Casey.

If there remain any doubt about whether FIFRA pre-empts local pesticide regulation, resort to the legislative

history of FIFRA is appropriate. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). That history indicates that specific legislative language that would permit local pesticide regulation was introduced in both the House of Representatives and in the Senate. In both chambers, the provision was expressly defeated in Committee with a reasoned explanation provided in the Committee reports. There can be no doubt that local pesticide regulation was debated in both chambers, and defeated in each.

## ARGUMENT

### I. FEDERAL PESTICIDE REGULATORY SCHEME

"Congress enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to regulate the use of pesticides in this country." *Defenders of Wildlife v. Administrator*, 882 F.2d 1294 (8th Cir. 1989). As such, FIFRA provides a comprehensive regulatory framework for registration, labeling, sale, use and cancellation of pesticide products. *Id.*; *Ruckelshaus v. Monsanto*, 467 U.S. 986, 991 (1984). In 1972, Congress "transformed FIFRA into a statute that cast a regulatory net over pesticides and their use, in part by giving the EPA enforcement authority over the use, sale and labeling of pesticides." *Professional Lawn Care Association v. Village of Milford*, 909 F.2d 929, 933 (6th Cir. 1990).

Title 7 U.S.C. 136a provides a comprehensive scheme for registration of pesticides. The applicant is required to submit data on the safety and efficacy of the product to the Environmental Protection Agency (EPA). This data is provided by the manufacturer. EPA will register a product if "when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment."<sup>1</sup> The process is one of weighing the risks and the benefits of the pesticide.

<sup>1</sup> 7 U.S.C. 136a(5).

That same section provides:

"The Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide. Where two pesticides meet the requirements of this paragraph, one should not be registered in preference to the other."

No pesticide product may be sold unless it is registered. 7 U.S.C. 136a(a).

Instructions for the safe use of a pesticide product are also part of the registration process. These instructions are conveyed to product users such as farmers by means of a "label." The label provides instructions on such things as what crops the pesticide may be used on and what pests it controls, method of application, safety instructions, maximum dose and disposal and storage instructions. The pesticide use instructions communicated by the label tell the user how to use the product safely and effectively. The label essentially synthesizes the scientific data and conclusions to concise form that the farmer—generally a non-scientist—can understand.

Using a pesticide product in a manner inconsistent with its labeling is a violation of FIFRA punishable by civil and/or criminal penalties. See 7 U.S.C. 136j(a)(2)(G).

Likewise, FIFRA contains detailed procedures for cancellation of pesticides. 7 U.S.C. 136d. Pesticide registrations may be cancelled if the product "when used in accordance with widespread and commonly recognized practices, generally causes unreasonable adverse effects on the environment." 7 U.S.C. 136d(b).

As with registration, EPA weighs the relative merits of the risks of continued use with its benefits as the criterion for its decision.

Section 136d(b) also permits any person "adversely affected by the notice" of cancellation to request a hear-



ing before an Administrative Law Judge prior to final action being taken.

## II. FIFRA PRE-EMPTS THE CASEY PESTICIDE ORDINANCE

As early as 1824 this Court recognized that state or local laws that "interfere with or are contrary to" federal law can be invalidated under the Supremacy Clause of the Constitution. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

Federal pre-emption can generally occur in either of two ways. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). First is the so called "field pre-emption" which occurs when Congress indicates its intent to occupy a given field. See *Pacific Gas & Electric Co., v. State Energy Resources Conservation & Dev. Commission*, 461 U.S. 1990 (1983).

As indicated above, "the amendments transformed FIFRA from a labeling law to a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 991 (1984). As amended, "FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority." *Id.* at 991-992.

This is the "field" of federal regulation of pesticides.

The second general manner of pre-emption occurs when a state or local law is in conflict with the federal law. This "conflict pre-emption" occurs when "it is impossible to comply with both state and federal law." See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-3 (1963). It may also occur when the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

To some extent, the areas of field pre-emption and conflict pre-emption overlap. If a state or local govern-

ment regulates in an area covered by federal regulation, and that local regulation imposes different regulatory criteria or standards, there will be some conflict with the federal law.

So it is with FIFRA and the Casey ordinance. The scheme set forth in FIFRA for the orderly administration and use of pesticides while concurrently protecting human and environmental values is put out of whack by the Casey ordinance. Similarly, the delineation of responsibilities of manufacturer, distributor and user, and the flow of information among them according to their respective positions, is destroyed by the Casey ordinance. The plain fact is that the Casey ordinance places a tremendous burden on the prospective pesticide user that obstructs the efficient management of FIFRA.

### A. FIFRA Pre-Empts the Field Covered by the Casey Ordinance

Petitioners attempt to make much of the argument that the Town of Casey ordinance "addresses local conditions" and merely "supplements" the regulatory framework of FIFRA. An examination of the ordinance and a comparison with FIFRA clearly shows that it does neither. Instead, the ordinance is in reality a "mini FIFRA" that purports to empower the Town Board of Casey to independently make the same complex pesticide decisions regarding pesticide use that are made by the Environmental Protection Agency (EPA) at the federal level.

In order to determine whether the regulatory "fields" of FIFRA and the Casey ordinance overlap, it is necessary to examine the true effect of the Casey ordinance on the FIFRA comprehensive regulatory scheme.

The first conclusion that one draws from reading the Casey ordinance is that it is much more than just a public notification law of the type reviewed (and upheld) in *New York State Pesticide Coalition, Inc. v. Jorliny*,



874 F.2d 115 (2d Cir. 1989) and that part of the Boulder, Colorado ordinance that was upheld in *Coparr, Ltd. v. City of Boulder*, 735 F.Supp. 363 (D. Colo. 1989). While the Casey ordinance refers to a desire to restrict aerial application of pesticides, the local requirement of applying for a permit before *any* pesticide use and the voluminous information required to accompany the application make it much more comprehensive than the aerial spray ban considered in *Deukmejian v. County of Mendocino*, 683 P.2d 1150, (Cal. 1985).

The brief *amicus curiae* filed by the Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado in support of Petitioners impliedly recognizes the distinction between the nature of the Casey ordinance and notification ordinances. All three municipalities—purporting to have only the notification type ordinance—attempt to distance themselves from the more comprehensive Casey ordinance. At page 27 of their brief these *amici* state: “Given the cost and complexity of such [risk benefit] determinations, only a small portion of local pesticide laws, such as local bans on the use of particular pesticides or local permitting decisions that have the same effect, revisit these determinations, and thus only those laws would be pre-empted on the ground that they enter this field or conflict with federal regulation.”

Yet that sort of revisitation is precisely what the Casey ordinance does. And it is the Casey ordinance that is before the Court.

Rather than addressing local conditions, the ordinance is an independent pesticide regulatory scheme that stands alone without regard to federal or state pesticide standards.

First, it is clear from the ordinance and its preamble that the ordinance does not address local conditions, but is instead a method for limiting pesticide use altogether. Rather than setting forth any special local conditions to

be addressed, the preamble states the Town Board’s total opposition to pesticides:

“WHEREAS, the Town of Casey has previously indicated, by resolution, its strong opposition of pesticides;”

Moreover, the purported “risks” that the ordinance applies to the Town of Casey<sup>2</sup> are not local risks. The ordinance does not describe any purely local circumstances (such as abnormally low water table, special soil type, local climate conditions) that might differentiate the use of pesticides in the Town of Casey from any other locality. The local conditions that Petitioners cite as being appropriately addressed in local regulation are absent from the Casey ordinance.

By failing to mention any local conditions that might need to be addressed the ordinance seeks to address only general situations that are already the subject of federal regulation through FIFRA and implementing regulations.

Secondly, the information that the ordinance requires to be submitted with a pesticide use application is generally the same information that EPA requires of manufacturers in determining whether to register or cancel a pesticide. As indicated above, FIFRA requires that EPA weigh the risks and the benefits of the pesticide use in reaching a decision.

While not specific in describing the criteria to consider in passing on an application, the Town of Casey ordinance requests the same information. For example, section 1.3(2)(d) requires submission of “an inventory of the pesticide(s) to be used listing the brand name, generic component ingredients, the quantities to be used, method of application, *known benefits and know (sic) risks associated with the chemical(s) to be used . . .*” (Emphasis added)

<sup>2</sup> i.e., “WHEREAS, aerial spraying of pesticides in the Town of Casey has affected property beyond the boundaries of the target area as a result of drift and/or overspray;”

Likewise, section 1.3(2)(g) requires information on "the positive and negative effect of eliminating the use of the proposed pesticide(s) and of any chemical alternatives . . ." This appears to be merely a restatement of the risk benefit submission required in section 1.3(2)(d) above.

Whether it is called "risk-benefit" or "positive-negative effect," it is the same data that EPA considers in making pesticide decisions.

Yet those regulatory decisions have already been made by EPA. Federal registration of a pesticide and approval of a pesticide label by EPA means that EPA has weighed the risks and the benefits of the product, based on a consideration of volumes of test and laboratory data submitted by the manufacturer, and has found that the product can be used safely if used in accordance with the instructions found on the product label.

Not only does the Casey ordinance encompass the same subject matter as FIFRA, but the ordinance allows the Town Board to deny pesticide use altogether. This gives the Town Board authority to second guess the EPA decision to register and label a pesticide as safe-based on essentially the same data that EPA considered—and to even reach a contrary conclusion by denial of a pesticide use permit.

The ordinance is, therefore, not a measure that fills any gaps that FIFRA does not cover. Rather, it is a separate, independent pesticide regulatory scheme that is not tied in to either state or federal standards. The ordinance clearly authorizes the Town Board to make an independent evaluation of the submitted data and to make a decision on a pesticide use application on any grounds it wants. Further, the Board is clearly authorized to disagree with the state and federal decisions with regard to the pesticide by denying a pesticide use permit application. Moreover, the Town Board is given com-

plete discretion so that any findings or conclusions made at either the state or federal level about the pesticide in question need not be considered by the Town Board. With that complete discretion, the Town Board cannot be said to be acting pursuant to state pesticide policy or by delegation of authority from the state. The absence of a reference to state pesticide standards suggests a regulatory scheme that is independent of both state and federal laws.

Also, the hearing and appeal process in the ordinance is very similar to that spelled out in FIFRA (7 U.S.C. 136d). This provides further evidence that this ordinance is designed as a "mini-FIFRA" to regulate pesticide use independently of state or federal law. The fact that there are no decisionmaking criteria in the ordinance to guide the Board—such as the risk-benefit analysis required by FIFRA—reveals it as an independent regulatory scheme.

To demonstrate the overlap in the regulated "fields" and the independence of the Casey scheme, we need only consider the following:

If the Court were to find for Petitioners in this case and find that local communities could enact pesticide ordinances like the that at issue here, there would be no further need for either FIFRA or state pesticide laws. Each local governing body would be able to regulate pesticides as it pleases according to its own wishes.

#### **B. The Casey Ordinance Is Pre-Empted Because It Is in Conflict With FIFRA**

Federal law may also pre-empt state or local regulation if the local regulation is in conflict with the federal law. See *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986). Local regulation may be in conflict with federal law where it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz*, *supra*, at p. 67.

The Casey ordinance frustrates FIFRA's comprehensive pesticide regulatory scheme in a number of ways. It regulates pesticides without requiring compliance with FIFRA standards, it makes pesticide use overly burdensome and it leaves production agriculture vulnerable to serious pest infestations. Each of these results "stands as an obstacle" to the accomplishment of the goals of FIFRA.

**1. The Ordinance Permits Pesticide Use Decisions Without Regard to Federal Standards**

One of the express, overriding purposes of a comprehensive federal pesticide regulatory program is to achieve a uniformity of regulations. Section 136t(b) requires state and local governments to cooperate with EPA to achieve this uniformity. The Casey ordinance does the opposite. FIFRA recognizes that pesticide use has many benefits for the production of food in the United States,<sup>3</sup> as well as the fact that some products might cause certain risks. Through FIFRA, Congress "implemented a comprehensive framework that balances agricultural and environmental concerns." *Defenders of Wildlife v. Administrator*, supra at 1298. At 7 U.S.C. 136a, the EPA is required to weigh and consider the benefits and the risks of pesticides in deciding whether to register a pesticide. At 7 U.S.C. 136d EPA weighs the benefits and risks in determining whether to cancel a pesticide use. "The EPA, in reviewing registrations and applications for registrations, strikes this balance in every case." *Defenders of Wildlife*, supra at 1299.

The Casey ordinance does not strike this balance in any case. Unlike FIFRA's risk-benefit requirement, the Casey ordinance contains no review standards at all. The ordinance permits the Casey Town Board to undercut the risk-benefit requirements of FIFRA completely.

<sup>3</sup> See *U.S. Code Cong. & Admin. News*, Vol. 3, p. 3995.

Furthermore, FIFRA's regulatory scheme indicates that pesticide registration, use and cancellation decisions be made on the basis of scientific review. Sections 136a and 136d provide for the submission of comprehensive scientific data for review by EPA scientists.

The Senate Committee on Agriculture & Forestry noted that "few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithall to provide necessary expert regulation comparable with that provided by the state and federal governments."<sup>4</sup>

The clear message is that pesticide decisions are to be based on the ability to regulate and sound science, not on emotion.

The Casey ordinance frustrates this federal regulatory purpose. While the ordinance requires the submission of an extensive amount of information, it also provides that the three member Town Board make a decision within 15 days of submission. (Casey Ord. 1.3(3)). That time frame would be extremely tight for three scientists working full time to review and analyze the data. For three town residents who may or may not be scientists and who probably have other employment, this time schedule makes it impossible to base a permit decision on sound science.

Similar ordinances in the thousands of localities across the country would destroy the uniformity of regulation that FIFRA strives to achieve. Instead of science based pesticide regulation, use would be regulated according to community whim. Instead of carefully considering the benefits and risks of a product, use decisions would be made on whatever basis the community desired.

In other words, FIFRA's goals would be completely frustrated.

<sup>4</sup> 1972 *U.S. Code Cong. & Admin. News*, Vol. 3, p. 4008.



## **2. *The Information Requirements of Local Ordinances Such As the Casey Ordinance Are Unduly Burdensome to Farmers and Ranchers***

The Casey ordinance further frustrates the goals of FIFRA by making it unduly burdensome for farmers and ranchers to comply. The Casey ordinance requires pesticide use applicants to submit substantial technical information about the pesticide along with the application. Such information includes: risks and benefits of the pesticide, its generic ingredients, all viable alternatives, positive and negative effects of reducing or eliminating the use, anticipated impacts on man and the environment, and the status of the product in EPA's re-registration, special review and other EPA programs.

This is essentially the same kind of information that FIFRA requires the EPA to collect and evaluate in making pesticide decisions. While the ordinance does not describe the specificity of the information required, the amount of information to be submitted with the pesticide use application is nevertheless quite substantial.

In the case of FIFRA, the product registrant—usually the manufacturer—must file the required data. 7 U.S.C. 136a. The registrant is the one who has conducted the requisite tests and who has both the best knowledge of the product and also has control of the required information.

The Casey ordinance, on the other hand, requires the pesticide use applicant to submit what amounts to the same type of information required by EPA for registration. Many farmers and ranchers apply their own product if they have been certified by the state to do so. Unlike the product registrant, individual farmer applicators generally have little toxicological background and do not have access to the type of information that ordinances like the Casey ordinance require. This makes it almost impossible for applicants to comply with the Casey ordinance.

Farmers and ranchers receive directions for use, storage and disposal of a particular product through the product labeling. As defined, a product label "means the written printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." 7 U.S.C. 136(p)(1). Pesticide labeling is part of the information required to be submitted during registration (7 U.S.C. 136a(c)(1)(C)) and also will distinguish whether a product is for "general" or "restricted" use. (7 U.S.C. 136a(d)). Use of a product "in a manner inconsistent with its labeling" subjects violators to civil and criminal penalties (7 U.S.C. 136(ee)).

Most of the information required by the Casey and similar ordinances is not found on the label. Farmers, ranchers and other end users of a particular product who would be required to submit this information do not have it available nor do they have ready access to it. Even commercial applicators do not generally have all the type of information required. For example, the various EPA status reports that the ordinance requires can only be supplied by EPA. Similarly, the risk-benefit and other health, safety and environmental information required is also most readily available from EPA. To require pesticide use applicants to provide this information for every intended pesticide application places not only an undue burden on users, but potentially also the EPA.

Finally, such data requirements from one local jurisdiction are burdensome enough. However, if each local jurisdiction is permitted to require its own information on its own forms, with its own waiting requirements, the situation becomes impossible for producers farming within two or more local jurisdictions.

## **3. *The 60 Day Notice Requirement Makes It Impossible to Respond to Emergency Situations***

Pesticide users are often forced to respond to emergency situations in which a particular pest rapidly infests an area. FIFRA section 18 (7 U.S.C. 136p) al-

lows the EPA to exempt federal or state agencies from the other provisions of FIFRA in order to respond to the emergency. Such emergency situations can either be a specific emergency that threatens significant economic or environmental loss, a quarantine required to stop new pest species from spreading, threats to public health, or in a crisis situation that might involve any one of the other three situations. See 40 C.F.R. 166.2.

The Casey permit procedure fails to address any of these situations. The cumbersome application procedure coupled with the 60 day notice requirement disables the Town of Casey from responding to any emergency situation and frustrates the federal response.

There is a very real conflict between FIFRA section 18 and the Casey 60 day notice requirement. If the Casey ordinance is allowed to stand, there is no assurance that either the state or federal authorities could respond to any type of emergency.

For farmers and ranchers, there are some pest control methodologies that utilize pesticides only when pest populations reach certain levels in a specific field.

One such method known as Integrated Pest Management (IPM) uses a wide range of control methods to achieve pest control. Under IPM, pesticide use would only take place when the weed or pest reaches certain levels in the field. Treatment is based on need and is critically timed treatment.

Under IPM techniques, fields are closely monitored for weed and pest levels. When a certain level of pest or weed density is reached, one application of a product will act to control the weed or pest. However, even for those weeds or pests that might recur annually, there is no way of a farmer or rancher knowing when that critical level might be reached. Often, farmers and ranchers have only 24 hours notice to apply pesticides under the IPM system. The 60 day notice requirement

and its burdensome application requirements make IPM unavailable as an alternative practice.

However, even if a local ordinance did not contain a 60 day requirement, a neighboring jurisdiction might include such a provision or might include provisions that would unduly restrict pesticides critical to IPM practices. This could prevent producers whose property is in more than one jurisdiction from using IPM.

Also, local ordinances such as Casey's prevent the treatment of weeds and pests thus creating breeding grounds and overpopulation of those weeds and pests leading to the type of emergency situations addressed in FIFRA.

### III. THE LEGISLATIVE LANGUAGE AND LEGISLATIVE HISTORY OF FIFRA CLEARLY INDICATE FEDERAL PRE-EMPTION OF THE CASEY ORDINANCE

Whether or not a certain action is pre-empted by federal law is a matter of Congressional intent. *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). To discern that intent this Court examines the explicit statutory language and "the structure and purpose of the statute." *FMC Corp. v. Holliday*, 498 U.S. — (1990). Based on these principles, the Wisconsin Supreme Court correctly concluded that the Casey ordinance was pre-empted by FIFRA.

#### A. The Structure and Purpose of FIFRA Requires Pre-Emption of the Casey Ordinance

While FIFRA expressly allows states to enact pesticide regulations in addition to FIFRA (7 U.S.C. 136v), that same authority does not extend to local governments. "State" is defined in FIFRA at 7 U.S.C. 136(aa):

"The term 'state' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the



Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa."

While 7 U.S.C. 136v does not specifically refer to local governmental entities, other sections of FIFRA do. Thus, "any state or political subdivision" may inspect records of pesticide dealers (7 U.S.C. 136f(b)). Similarly 7 U.S.C. 136r(b) and (c) provides a plan for monitoring pesticides "in cooperation with other Federal, State or local agencies." Both of these sections specifically include local agencies or political subdivisions *as well as* State agencies.

Where Congress includes particular language in one section of a statute and omits it in another part, the general presumption is that Congress acted intentionally and purposely. See *Russello v. United States*, 464 U.S. 16, 23 (1983). With regard to the present issue of the definition of "State," "one would need look no further than the Eleventh and Fourteenth Amendments to the Constitution to find radically different usages of that term." *Professional Lawn Care Association supra*, at 941 (Nelson concurring). As used in the Fourteenth Amendment, the term includes political subdivisions, whereas in the Eleventh Amendment it does not.

The fact that the language of 7 U.S.C. 136v does not refer to "political subdivisions" or other such language does not, as Petitioners suggest, wrap the issue with uncertainty. Rather, where such language is used elsewhere in FIFRA, its omission in section 136v must be construed as purposeful.

Likewise, the structure and intent of FIFRA suggest pre-emption of local ordinances like that of Casey. As indicated above, FIFRA is a comprehensive pesticide regulation statute that was amended in 1972 to increase federal pesticide jurisdiction.<sup>5</sup> The statute set specific

<sup>5</sup> One of the main purposes of the 1972 amendments was to bring pesticides distributed entirely within a State under federal jurisdic-

procedures and criteria for EPA to follow from pesticide registration and labeling to cancellation. It describes what kinds of data EPA may require and how it should be analyzed.

FIFRA also recognizes that EPA has the resources and the expertise to analyze the voluminous data required to be submitted with pesticide applications and make the complex decisions that have to be made. The Congress has funded EPA to permit the agency to have the scientific expertise to make these complex decisions. That scientific expertise and the careful analysis of risks and benefits crafted into FIFRA would be lost if the ordinance were upheld. Instead, pesticide use decisions would be made on the basis of political rather than scientific considerations, and by local, non-scientific governing bodies rather than trained scientists.

Further, FIFRA contemplates a fairly uniform system of pesticide regulation (see 7 U.S.C. 136t(b)). That goal cannot be achieved if local governments are allowed to regulate pesticides. The Casey ordinance makes no reference to federal or state pesticide regulation standards as a criterion in determining whether or not to grant an application. The ordinance allows the Town to make its own independent decision on pesticide use without regard to what the state or federal agencies have determined about the pesticide. Should the Casey ordinance be upheld, every Town Board of every municipality or other local agency across the country would be free to establish an independent pesticide regulatory scheme that does not necessarily have to draw upon the scientific expertise of EPA or of the state pesticide agency to help or guide its decisionmaking. Instead of "uniformity of regulations," the result would be regulatory chaos.

tion. Sen. Rep. No. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News, 3993, 3996.



**B. The Legislative History of the 1972 FIFRA Amendments Clearly Shows Pre-Emption of Local Pesticide Regulation**

An examination of legislative history is relevant in determining the meaning and purpose of a statute. *Silkwood v. McGee Corp.*, 464 U.S. 238 (1984) and *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983). This Court has long acknowledged that "[r]eports to Congress accompanying the introduction of proposed law may aid the courts in reaching the true meaning of the legislation in cases of doubtful interpretation." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). While the legislative history should never substitute for express statutory language, "resort to *bona fide* legislative history is always permissible and may sometimes be helpful." *Professional Law Care Association*, supra at 940 (Nelson concurring).

Petitioners attempt to cloud the clear meaning of the legislative history of the 1972 FIFRA amendments, downplaying each Congressional expression of local pre-emption in the process. Being unable to return to 1972, the legislative history is all that we have to ascertain Congressional intent absent clear statutory language. If legislative history means anything as an aid to statutory interpretation, the history surrounding enactment of FIFRA in 1972 must be construed as providing pre-emption of local pesticide regulation. All of the circumstances point to that conclusion.

The original legislative package from President Nixon in 1971 (H.R. 4152) contained a forerunner to section 136v that specifically provided that both states and political subdivisions could regulate pesticides. See *Maryland Pest Control v. Montgomery County*, 646 F. Supp. 109, 111-112 (D. Md. 1986).

In reporting the bill to the full House, the House Agriculture Committee deleted the reference to political subdivisions, stating:

"The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions."<sup>6</sup>

The bill (now H.R. 10729) passed the House of Representatives on November 9, 1971.<sup>7</sup>

The bill then went to the Senate Committee on Agriculture and Forestry. That Committee expressly agreed with the House Agriculture Committee, and in its Report it stated that "it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides."<sup>8</sup>

To this point in the history of the 1972 FIFRA amendments there can be no doubt that the idea of local pesticide regulation had been specifically and categorically rejected at every stage in the legislative process.

The Senate Commerce Committee also asserted jurisdiction over the bill. It proposed a series of amendments to H.R. 10729 that included a provision allowing local regulation of pesticides. The Senate committee on Agriculture and Forestry objected to these amendments and filed a Supplemental Report that stated that "regulation by the Federal government and the 50 States should be sufficient and should pre-empt the field." 1972 U.S. Code Cong. & Admin. News, Vol. 3, 4026.

Both Committees met to thrash out a compromise. After nearly two months, a compromise bill was reached. *Id.* at 4088.

<sup>6</sup> H.R. Rept. No. 92-511, p. 16.

<sup>7</sup> See U.S. Code Cong. & Admin. News, Vol. 3, 1972, p. 3993.

<sup>8</sup> S. Rep. No. 92-838, 92nd Cong., 2d Sess., quoted in *Mortier, et al. v. Town of Casey, et al.*, 452 N.W. 2d 555 (1990).

The description of the compromise that was reached is set forth in 1972 *U.S. Code & Cong. & Admin. News*, Vol. 3, p. 4089-4092. That explanation specifically states:

"Commerce Committee amendments 4 (penalties), 8 (hearing structure), 10 (*authority of local governments to regulate the use of pesticides*), 12 (authority of states to register pesticides), 13 (record-keeping by private applicators) and 14 (right of entry) are not included in the substitute." (Emphasis added) *Id.* at 4091.

Again, to this point there is no confusion about Congressional intent. The debate between the two affected committees over FIFRA resulted in a compromise in which each side conceded some points. As clearly indicated, the Commerce Committee receded from its position on local pesticide regulation.

The original Commerce Committee amendments, including the local regulation amendment, were offered on the Senate floor during debate on FIFRA. A motion was adopted to withdraw those amendments and substitute the compromise bill. The full Senate approved the compromise bill.

Since neither the final House bill nor the final Senate bill had a local regulation provision, the issue was not discussed in Conference.

Petitioners have no answer for this clear expression of Congressional intent. Instead, they argue that the Senate merely "agreed to disagree" about the issue without resolving it. Their position ignores the express consideration and defeat of the very language Petitioners support. Contrary to their assertions, the pre-emption issue was not "tabled" by the Committee compromise. Rather, as the joint report indicates, it was deliberately omitted from the compromise bill during deliberations. Further, the issue was raised again on the Senate floor, and defeated once again in favor of the Committee compromise substitute bill.

These circumstances do not indicate Congressional uncertainty. The lack of specific pre-emptive language does not create ambiguity. Instead, it indicates defeat. The record clearly shows that attempts to carve out a legislative exception for local pesticide regulation from this comprehensive federal statute were defeated in both chambers of Congress with full understanding of what they were doing.

As the *amicus curiae* brief of the United States indicates, "there are some strong and directly relevant committee statements favoring pre-emption of local regulation. . ."

The Wisconsin Supreme Court was correct in concluding that the legislative history of FIFRA is very clear that Congress intended to pre-empt local pesticide regulation of the type at issue in this case. The American Farm Bureau Federation urges this Court to find pre-emption as well.

### CONCLUSION

Through FIFRA, Congress enacted a comprehensive framework of pesticide regulation. This framework provides for the balancing of the risks and the benefits of a particular product, and provides systematic procedures for registration, labeling, use and cancellation of pesticides.

The Casey ordinance is one local government's attempt to cast FIFRA aside and establish its own independent system of pesticide regulation. Instead of the carefully crafted risk-benefit analysis set forth in FIFRA, the Casey Town Board would be able to grant or deny pesticide use for any reason it wants.

There are thousands of local entities like Casey across the United States. If each of those entities were able to enact ordinances similar to that of Casey, there would no longer be any need for FIFRA or state pesticide laws. Everything would be regulated at the local level. The

result would be regulatory chaos from one jurisdiction to another.

The very reasons that FIFRA was enacted in the first place require that the Wisconsin Supreme Court decision be affirmed. Uniformity of pesticide regulations is necessary in order to provide a degree of certainty to farmers and ranchers that they can protect their crops in a coordinated manner, especially when their farms or ranches cross local jurisdictional boundaries.

Pre-emption of the Casey ordinance also assures that pesticide use decisions are made on the basis of scientific scrutiny. Local governments do not generally have the scientific expertise required to make the complex pesticide decisions that FIFRA requires.

The comprehensive, scientific and coordinated regulatory framework that FIFRA seeks to achieve will no longer exist if the Casey ordinance is allowed to stand.

Both the law and the legislative history of the 1972 FIFRA amendments clearly indicate that FIFRA pre-empts ordinances such as that of Casey.

The decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

WISCONSIN PUBLIC INTERVENOR,  
and TOWN OF CASEY,

*Petitioners,*

v.

RALPH MORTIER and WISCONSIN FORESTRY/  
RIGHTS-OF-WAY/TURF COALITION,

*Respondents.*

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On Writ of Certiorari to the Wisconsin Supreme Court

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**BRIEF AMICUS CURIAE**  
on behalf of  
**NATIONAL PEST CONTROL ASSOCIATION,  
NATIONAL AGRICULTURAL CHEMICALS  
ASSOCIATION, AGRICULTURAL COMMODITY  
COALITION, EDISON ELECTRIC INSTITUTE,  
and CHEMICAL MANUFACTURERS  
ASSOCIATION**

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No. 89-1905

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1990

WISCONSIN PUBLIC INTERVENOR,  
and TOWN OF CASEY,

*Petitioners,*

v.

RALPH MORTIER and WISCONSIN FORESTRY/  
RIGHTS-OF-WAY/TURF COALITION,

*Respondents.*

On Writ of Certiorari to the Wisconsin Supreme Court

## BRIEF AMICUS CURIAE

on behalf of

NATIONAL PEST CONTROL ASSOCIATION,  
NATIONAL AGRICULTURAL CHEMICALS  
ASSOCIATION, AGRICULTURAL COMMODITY  
COALITION, EDISON ELECTRIC INSTITUTE,  
and CHEMICAL MANUFACTURERS  
ASSOCIATION

Petitioners and respondents having consented, the National Pest Control Association, National Agricultural Chemicals Association, Agricultural Commodity Coalition, Edison Electric Institute, and Chemical Manufacturers Association are submitting this brief as *amici curiae*. The brief supports the position of respondents that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988), preempts regulation of pesticides by local units of government.



## INTEREST OF THE AMICI

The *amici curiae* are national trade associations whose members protect the public from the health hazards and economic harm of pests.<sup>1</sup> Their members are manufacturers, commercial applicators, and consumers of structural, agricultural, horticultural, right-of-way, and other pesticides, the use of which is more extensively regulated by the federal and state governments than any other type of chemical.

The *amici* and their members support the comprehensive, highly competent, well-coordinated system of federal and supplementary state regulation which Congress established through enactment of FIFRA. They are filing this brief to explain why the integrity and utility, indeed the very purpose, of that system would be destroyed if the Court were to accept petitioners' invitation to rewrite FIFRA by allowing each of the 83,200 local

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<sup>1</sup> The **National Pest Control Association** represents over 10,000 companies engaged in residential, institutional, and industrial pest control, and thirty-seven affiliated state pest control associations, including the **Pest Control Operators of California** and the **Florida Pest Control Association**. The **National Agricultural Chemicals Association** is comprised of the companies that manufacture, formulate and distribute virtually all of the agricultural crop protection chemicals and horticultural pesticides used in the United States. The **Agricultural Commodity Coalition** consists of the **National Cotton Council of America**, the **National Corn Growers Association**, the **American Soybean Association**, and the **National Association of Wheat Growers**, whose members depend upon cost-effective pest control for efficient crop production. The **Edison Electric Institute** represents virtually all investor-owned electric utility companies, which rely on pesticides in a variety of operations such as maintaining and controlling plant growth along transmission line rights-of-way and preserving wood utility poles. The **Chemical Manufacturers Association** is the national association for industrial chemical producers, including its **Biocides Panel**, which represents the industrial biocides industry, encompassing preservatives and biocides used in manufacturing processes.

governments in the United States<sup>2</sup> to second-guess federal and state regulatory determinations by devising their own individual sets of requirements and restrictions on pesticide use.

Local regulation would render superfluous the sophisticated scientific reviews and painstaking risk-benefit analyses which the United States Environmental Protection Agency ("EPA") conducts at great expense for each pesticide, and which a State's pesticide agency can fine-tune if necessary. It would displace dispassionate federal and state regulators, and the scientists who assist them, with local politicians who have no pesticide expertise. Such local officials would be free to prohibit or interfere with essential pest control operations, despite the fact that EPA and their State's pesticide agency have determined that the pesticides involved can be used without unreasonable human or environmental risk.

The resulting jumble of overlapping, conflicting, confusing and unnecessary local ordinances would severely impair, if not make impossible, delivery of timely, cost-effective pest control. As a consequence, public health and safety, the environment, and the economy would suffer.

Congress did not intend such a result when it rewrote FIFRA in 1972 in order to transform the Act into a comprehensive regulatory statute. To ensure well-balanced regulation, Congress gave EPA pervasive authority to regulate pesticides in both interstate and intrastate commerce, and extended supplementary authority only to the States themselves. In so doing, Congress made a conscientious decision that FIFRA's goals would not be served by allowing local governments to regulate pesticides.

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<sup>2</sup> United States Department of Commerce, *Statistical Abstract of the United States* 1990, at 271-72 (110th ed.). Local governments include not only counties, municipalities and townships (38,900), but also special regulatory districts (e.g., power, irrigation, housing) (29,500), and independent school districts (14,700), which have a governmental character and substantial autonomy. See *id.*

Neither the petitioners nor any of the *amici* which oppose preemption have discussed the deleterious effects of local regulation on the federal-state scheme, or the regulatory chaos that would result from reversal of *Mortier v. Town of Casey*. Local pesticide ordinances not only would proliferate, they would devour FIFRA's system of federal-state regulation and the protections that it affords the public, the environment, and industry. For this reason, the *amici* urge affirmance of the Wisconsin Supreme Court's decision that FIFRA preempts all regulation of pesticides below the state government level.

### SUMMARY OF ARGUMENT

The issue in this case is whether tens of thousands of local governments in the United States should be allowed to regulate pesticides, or whether Congress' carefully drawn scheme of federal and supplementary state regulation preempts such local regulation.

Based on the well-established principles of federal preemption, which apply to local regulations as well as state laws, there are two fundamental reasons why FIFRA preempts local governments from regulating pesticides:

*First*, FIFRA is a comprehensive statute, granting EPA authority to regulate virtually every aspect of pesticide registration, labeling, and use. By legislating comprehensively, Congress occupied the field of pesticide regulation, thereby preempting all state and local police power over pesticides, except for the specific supplementary regulatory authority which Congress expressly ceded to the States in FIFRA § 24, 7 U.S.C. § 136v. Thus, Congress left no room for regulation of pesticides by units of government below the state level.

The decision of the Wisconsin Supreme Court, and the opinions of the only two federal appellate courts which have considered the issue, analyze FIFRA's language and legislative

history and conclude that congressional intent to preempt local regulation is clear. The fact that congressional committees debated and even temporarily disagreed on the question of local regulation confirms that Congress' ultimate decision to preclude local regulation was well considered and deliberate.

Despite the advocacy position being espoused by the Solicitor General, EPA's longstanding, published interpretation of the statute is that Congress did not extend pesticide regulatory authority to political subdivisions within a State. This view not only is correct, it is consistent with congressional testimony given by EPA on numerous occasions.

Moreover, Congress has refused to change the statute to authorize local regulation, even though it is aware that many local governments wish to regulate pesticides, and that courts and EPA have interpreted FIFRA as preempting all local regulation. Furthermore, the States should not be allowed to circumvent FIFRA and congressional intent by attempting to delegate their regulatory authority to local governments.

*Second*, local regulation also is preempted because it would interfere with accomplishment of Congress' objectives. Through enactment of FIFRA, Congress sought to establish a well-coordinated and comprehensive system of federal and supplementary state regulation. Local regulation would obstruct that goal by undermining EPA's and state pesticide agencies' carefully considered scientific and regulatory decisions, superseding them with a myriad of unnecessary, uncoordinated, politically motivated requirements and restrictions adopted by local governments which lack the requisite scientific expertise, financial resources and objectivity to regulate pesticides competently.

In addition, and equally important, local regulation would conflict with Congress' goal of making cost-effective pest control available to the public, agriculture, and industry. If local regulation suddenly were allowed, there would be a nationwide

chain reaction of multiple, overlapping, conflicting or inconsistent, and onerous local ordinances. Because most pest control companies, commercial agricultural and right-of-way applicators (commonly referred to as "custom applicators"), and aerial applicators are small businesses which must be able to operate in more than one local jurisdiction, such a regulatory quagmire would make it logistically and/or financially impossible for them to provide timely, affordable, and efficacious service. Not only would FIFRA's fundamental purposes be defeated, there also would be adverse public health, environmental and economic consequences.

## ARGUMENT

### FIFRA PREEMPTS ANY AND ALL LOCAL REGULATION OF PESTICIDES

#### I. Congress Intended To Occupy the Field of Pesticide Regulation

The *amici* agree with the Wisconsin Supreme Court, and with the Fourth and Sixth Circuits, that "it was the clearly manifested intent of the congress to preempt any regulation of pesticides by local units of government." *Mortier v. Town of Casey, Wisconsin*, 154 Wis. 2d 18, 452 N.W.2d 555, 560 (Wis. 1990). Congress has determined that "the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides." *Id.* at 558 (quoting S. Rep. No. 838, 92d Cong., 2d Sess. 16, reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4008). Further, Congress has found that local units of government lack "the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments," and that permitting local regulation "would be an extreme burden on interstate commerce." *Id.*

Under the supremacy clause of article VI of the Constitution, preemption occurs where federal legislation is so comprehensive, it can be inferred that Congress "left no room" for supplementary regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Through FIFRA, Congress has legislated comprehensively, occupying the field of pesticide regulation, and leaving no room for supplementary regulation below the federal level, except for the specific authority granted in FIFRA to each "State." *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 934 (6th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3180 (U.S. Aug. 31, 1990) (No. 90-382). Thus, "[w]hile the regulation of pesticides traditionally lies within the police powers of local communities, the federal legislation 'deprives' them of that authority." *Mortier*, 452 N.W.2d at 560.

#### A. The 1972 Amendments to FIFRA Left No Room for Local Regulation

"Because of mounting public concern about the safety of pesticides and their effect on the environment," Congress completely rewrote FIFRA in 1972, and "transformed [it] from a labeling law into a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). See Federal Environmental Pesticide Control Act of 1972 ("FEPCA"), Pub. L. No. 92-516, 86 Stat. 973. In so doing, Congress "divid[ed] the responsibility between the States and the Federal Government for the management of an effective pesticide program." H. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971) (emphasis added). Therefore, "when Congress rewrote the statute, it impliedly preempted the local regulation of pesticides." *Professional Lawn Care Ass'n*, 909 F.2d at 933.

"[T]he intent behind the 1972 amendments was to enact sweeping federal pesticide regulation . . . that cast a regulatory net over pesticides and their use." *Id.* The 1972 revision to FIFRA "was so comprehensive that courts would have treated



the entire field [of pesticide regulation] as having been occupied by the federal government absent the express disclaimer contained in § 24 of the Act.” *Id.* at 940 (Nelson, J., concurring).<sup>3</sup>

Section 24 of FIFRA (“Authority of States”) provides that “[a] State may regulate the sale or use of any federally registered pesticide,” but “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required” by EPA under FIFRA. 7 U.S.C. § 136v(a), (b). Thus, “Congress explicitly preserved the states’ right to regulate the ‘sale and use’ of pesticides while reserving ‘labeling’ to federal control.” *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989). Section 24(a), therefore, is “an affirmative grant of permission for ‘a State’ to regulate pesticide use.” *Professional Lawn Care Ass’n*, 909 F.2d at 940-41 (Nelson, J., concurring) (emphasis added); see also *Mortier*, 452 N.W.2d at 559.<sup>4</sup>

<sup>3</sup> The Act broadly defines “pesticide” as “(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.” 7 U.S.C. § 136(u). Accordingly, pesticides subject to FIFRA regulation include, but are not limited to, termiticides and other chemicals used in structural pest control; crop protection chemicals such as insecticides, herbicides, fungicides and plant growth regulators; horticultural chemicals used for lawn and garden care, and in greenhouses and nurseries; right-of-way herbicides used by electric utility companies; industrial biocides used in manufacturing processes; and pesticides applied aerially for wide-area control of mosquitoes, gypsy moths, and forest and other pests.

<sup>4</sup> The flaw in petitioners’ contention that FIFRA’s silence on political subdivisions somehow authorizes them to regulate pesticides is highlighted by the express limitation on the States’ authority set forth in § 24(b) (“Uniformity”). It would be absurd to interpret the Act as impliedly authorizing tens of thousands of local governments to do what, in the interest of uniformity, the statute expressly prohibits the States from doing. Despite their topsy-turvy “logic,” petitioners concede this point. See Brief of Petitioners at 31 n.5.

Further, “Congress left no doubt about what it meant when it referred to a ‘State.’” *Mortier*, 452 N.W.2d at 560; see 7 U.S.C. § 136(aa).<sup>5</sup> “In effect, [FIFRA § 24] is a declaration of negative preemption,” affirmatively granting “specific authorization for ‘states’ to regulate the sale or use of pesticides.” *Mortier*, 452 N.W.2d at 559.<sup>6</sup> “From this alone, it is possible to infer that regulation by other governmental entities not protected from preemption by [§ 24], is preempted.” *Id.* at 560.<sup>7</sup>

When the legislative history underlying enactment of the Federal Environmental Pesticide Control Act of 1972 is examined, “[t]he intent of congress — to preempt local, but not state, regulation — becomes abundantly clear.” *Mortier*, 452

<sup>5</sup> “The term ‘State’ means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.” *Id.*

<sup>6</sup> As an adjunct to this regulatory authority, Congress gave the States authority to operate EPA-approved plans for certification of restricted-use pesticide applicators. See FIFRA § 11, 7 U.S.C. § 136i; *infra* at 12 n.9. Congress also authorized the States, subject to EPA approval, to enforce pesticide use violations. See FIFRA §§ 23, 26, 27, 7 U.S.C. §§ 136u, 136w-1, 136w-2. It should be noted that state pesticide statutes are enacted pursuant to, and are limited by, FIFRA’s grant of regulatory and enforcement authority to the States.

<sup>7</sup> In an unpublished decision affirming “the well-reasoned opinion” by the Maryland federal district court that FIFRA preempts all local regulation of pesticides, including pesticide posting and notification requirements, the U.S. Court of Appeals for the Fourth Circuit noted as follows:

Prior to the [1972] amendment, state and local subdivisions had exercised regulatory powers over pesticides. Section 136v [FIFRA § 24] defines the extent to which they may continue to exercise regulatory authority. It expressly grants a *state* limited authority to regulate pesticide use.

*Maryland Pest Control Ass’n v. Montgomery County, Maryland*, 822 F.2d 55 (4th Cir. 1987) (unpublished opinion reproduced at 27 Env’t Rep. Cas. (BNA) 1150, 1151) (emphasis added).

N.W.2d at 558. For example, with the unanimous consent of the Senate, Sen. Allen, who chaired the subcommittee of the Senate Committee on Agriculture and Forestry responsible for the 1972 FEPCA amendments to FIFRA, inserted into the *Congressional Record* the following passage from S. Rep. No. 92-838:

[i]t is the intent that [FIFRA] section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, *should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.*

118 Cong. Rec. 32,256 (daily ed. Sept. 26, 1972) (quoting S. Rep. No. 838, 92d Cong., 2d Sess. 16-17, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4008) (emphasis added)).

The congressional deliberations which led to the decision not to allow local regulation are amply described in the cases and in respondents' brief, and the *amici* will not recount them here. Suffice it to say, "the legislative history could not be more clear." *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 646 F. Supp. 109, 111 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987). "[It] reveals a clear intent of the congress to preempt all local regulation of the use of pesticides." *Mortier*, 452 N.W.2d at 555.<sup>8</sup>

<sup>8</sup> *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984), upon which petitioners repeatedly rely, was expressly overturned by the California Legislature, a fact which petitioners fail to note. See 1984 Cal. Stat. c. 1386, sec. 3 (noted at Cal. Food & Agricultural Code § 11501.1 (West 1986)). The opinion of the Maine Supreme Judicial Court in *Central Maine Power Co. v. Town of Lebanon*,

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That the question of local regulation was the subject of debate within, and even temporary disagreement between, congressional committees responsible for rewriting FIFRA, only confirms that the ultimate exclusion of local authority was a carefully considered decision by both houses of Congress. "The decision was made well in advance of enactment of the legislation, it was known to and accepted by the members of the responsible committees, and it was openly explained prior to enactment." *Professional Lawn Care Ass'n*, 909 F.2d at 937 (Nelson, J., concurring). Thus, although an amendment permitting local regulation was considered, the "legislative history demonstrates that Congress *positively rejected* the proposal to make room for local governments in the field of pesticide regulation." *Id.* at 934 (emphasis added).

#### B. EPA Has Repeatedly Acknowledged that Only the States Themselves Have Supplementary Regulatory Authority

Congress entrusted the United States Environmental Protection Agency with administration of FIFRA. In carrying out this responsibility, EPA has explicitly interpreted the Act as preempting regulation of pesticides by local units of government: "It is not the intention of the Act . . . to authorize political subdivisions below the State level to further regulate pes-

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571 A.2d 1189 (Me. 1990), was rendered without the benefit of the *Mortier* and *Professional Lawn Care Ass'n* decisions, and contains virtually no FIFRA preemption analysis or discussion of FIFRA's legislative history. The district court's decision in *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), *appeal abated pending resolution of Wisconsin Public Intervenor v. Mortier*, No. 89-1341 (10th Cir. Jan. 15, 1991), is flawed because it rejects preemption of all local pesticide regulation on the erroneous theory that a home rule city can exercise the authority which Congress expressly reserved for the States themselves. See *infra* at 16 n.11.



ticides." 40 Fed. Reg. 11,698, 11,700 (1975).<sup>9</sup> The Court should give deference to this definitive, longstanding, published agency interpretation, and not to the advocacy position being advanced by the Government's attorneys in this case.

Furthermore, the Government attorneys' arguments are belied by the fact that at each of the congressional hearings leading to enactment of the 1972 amendments, EPA urged

<sup>9</sup> EPA provided this interpretation in response to a State's suggestion that an EPA rule regarding federal approval of state plans for certification of restricted-use applicators should allow local agencies to assist state authorities in implementing and maintaining the States' certification program. *Id.* EPA's interpretation relates to FIFRA § 24 in that certification of applicators is an *integral part* of the States' authority to regulate pesticide use pursuant to § 24(a). Indeed, the very purpose of applicator certification is to ensure that when EPA classifies a pesticide for restricted use, "the pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator." 7 U.S.C. § 136a(d)(1)(C)(i) (emphasis added). Thus, the Solicitor General's assertion (Brief for the United States at 22 n.20) that applicator certification does not pertain to state authority to regulate pesticide use is entirely incorrect.

Furthermore, EPA indicated that because of FIFRA's preclusion of local regulation, local assistance with state certification programs would be permitted only if it "is uniform throughout the State and is totally responsive to State direction." 40 Fed. Reg. at 11,700. This is the type of federal-state-local cooperation in implementing FIFRA's regulatory program contemplated by FIFRA § 22(b), 7 U.S.C. § 136t(b). Thus, contrary to petitioners' contention (Brief of Petitioners at 31-32), § 22(b) does not give local governments regulatory authority; nor does it "equate" political subdivisions with state agencies, as the Solicitor General erroneously asserts (Brief for the United States at 11). Instead, the role of local governments is limited to providing any specific assistance which EPA or a State may authorize, request, and approve with respect to implementation or enforcement of EPA's or a State's pesticide program. That is far different from affording authority to local governments to adopt their own regulations, even if subject to state approval. If Congress had wanted to give local governments authority to regulate pesticide use, it would have done so in FIFRA § 24 (as it did for the States), not in a different section of the Act.

Congress to strengthen and expand the role of the federal government in pesticide regulation, while allowing the States to play a supplementary role. For example, EPA Administrator William D. Ruckelshaus testified that EPA "would expect to assist the States in setting up pesticides programs or bringing existing programs into accord with EPA standards." *Federal Environmental Pesticide Control Act of 1971: Hearings Before the House Comm. on Agriculture on H.R. 26*, 92d Cong., 1st Sess. 730 (1971) (emphasis added). Similarly, EPA Assistant Administrator David D. Dominick explained that the Act as amended would "specif[y] the pesticide regulatory authority retained by the States." *Federal Environmental Pesticide Control Act: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry on H.R. 10729*, 92d Cong., 2d Sess. 93 (1972) (emphasis added).

At no time did EPA suggest that Congress should place pesticide regulatory authority into the hands of tens of thousands of local units of government. That would have been contrary to EPA's call for a federal pesticide statute which "broadens the scope of Federal regulation," extending even to intrastate products in order "to insure fairness and uniformity." *Id.* at 157; *Hearings on S.232, S.272, S.660, and S.745*, at 292-93.

From the outset, therefore, EPA recognized that by transforming FIFRA from a misbranding law into a comprehensive regulatory statute, Congress was occupying the entire field of pesticide regulation, except for the supplementary regulatory authority granted to the States. EPA has repeatedly confirmed this view. For example, in implementing 1978 amendments to subsection (c) of FIFRA § 24, EPA explained that "[t]he new legislation amends § 24(c) of FIFRA to provide the States with greater flexibility and independence in issuing registrations for 'special local needs.'" 44 Fed. Reg. 4352, 4359 (1979) (emphasis added); see 7 U.S.C. § 136v(c). Further, "Congress'



general intent [was] to broaden State registration authority under the amended section.” 44 Fed. Reg. 46,414, 46,415 (1979) (emphasis added); see also 46 Fed. Reg. 2008, 2010 (1981). Thus, EPA correctly interpreted FIFRA § 24 as embodying an affirmative grant of authority to the States in a regulatory field which otherwise has been occupied by the Federal Government through the sweeping pesticide legislation enacted by Congress.

### C. Congress Recently Reaffirmed Its Intention To Preempt Local Regulation

Congress’ most recent major amendments to FIFRA were in 1988, when EPA’s role in regulating pesticides, including especially review and reregistration of previously registered pesticides, was strengthened and expanded. See Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654. In enacting the 1988 amendments, Congress noted “the desire by States and their political subdivisions to assert greater control over pesticide use.” H. Rep. No. 939, 100th Cong., 2d Sess. 29, reprinted in 1988 U.S. Code Cong. & Admin. News 3474, 3478 (emphasis added); see also S. Rep. No. 346, 100th Cong., 2d Sess. 7 (1988).

Congress, however, did *not* respond by amending FIFRA to give local units of government authority to regulate pesticides. Instead, Congress amended FIFRA by establishing a new EPA pesticide reregistration program in order to “restore[] confidence in the regulatory system that governs pesticide approval and use.” *Id.* In this regard, Congress explained that the new reregistration provisions “would not restrict the authority of any . . . State as provided under section 24 of the Act to regulate the sale or use of any federally-registered pesticide or device in the State.” H. Rep. No. 939, at 30, reprinted in 1988 U.S. Code Cong. & Admin. News at 3479 (emphasis added). Congress, therefore, was aware of the desire of many local

governments to regulate pesticides, but refused to undermine the long-established FIFRA system of federal and supplementary state regulation by granting any such authority.<sup>10</sup>

### D. State Delegation of Regulatory Authority to Local Governments Would Contravene Congressional Intent

It would be completely at odds with § 24, and would defeat congressional intent, to interpret FIFRA in a manner that allows a State to delegate its pesticide regulatory authority to local governments, or that tolerates usurpation by local governments of such state authority. See *supra* at 12 n.9. “Congress did not intend to permit states to exercise their remaining authority . . . by delegating it to municipalities.” *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987) (municipal train speed ordinances preempted by federal statute which occupied the field of railroad safety but authorized state railway safety rules to address local safety hazards). The statute “does not say a state may regulate by ordinance.” *Id.*; see also *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.),

<sup>10</sup> Under the principle of congressional adoption, “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). At the time Congress enacted the 1988 FIFRA amendments, the only viable appellate decision on FIFRA preemption of local regulation was the June 1987 decision of the U.S. Court of Appeals for the Fourth Circuit affirming FIFRA preemption. *Maryland Pest Control Ass’n*, 822 F.2d 55. (As discussed *supra* at 10 n.8, the California Legislature had expressly overturned the holding of the Supreme Court of California in *People ex rel. Deukmejian v. County of Mendocino*.) In addition, the only published administrative interpretation was EPA’s declaration that FIFRA does not authorize political subdivisions to regulate pesticides. See 40 Fed. Reg. at 11,700. As a result, because Congress took no action with respect to regulation by local governments when it amended FIFRA in 1988, Congress should be deemed to have adopted EPA’s and the Fourth Circuit’s interpretation that FIFRA is intended to preempt such regulation.

cert. denied, 414 U.S. 855 (1973) (the Act "speaks of an exception for 'States,' and we . . . have before us individual officials of a parish government").

Thus, Congress meant what it said in FIFRA § 24(a), which extends pesticide regulatory authority only to a "State" as that term is expressly defined in the Act. See H. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971) (EPA cannot delegate to the States authority to set aside the preemption provisions of § 24(a)). Under the theory posited in the *amicus* brief submitted in support of petitioners by a handful of States, Congress could never, in occupying a regulatory field, determine that its goals will be met only by granting supplementary regulatory authority to the States themselves, and not to their political subdivisions. If the contention of those *amici* was correct, then federal law could never preempt local law — a proposition flatly contradicted by this Court's rulings that the supremacy clause applies to local regulation as well as state law.<sup>11</sup>

In summary, "Congress focused upon the very question here presented and concluded that only States and not their subdivisions should be authorized to regulate the sale and use of pesticides." *Maryland Pest Control Ass'n*, 646 F. Supp. at 111. "[I]t is the policy of the United States Congress to allocate the power to regulate pesticides at a level that stops at the state level." *Mortier*, 452 N.W.2d at 561.

<sup>11</sup> Petitioners' invocation of the Tenth Amendment is a red herring. No decision of this Court suggests that the Tenth Amendment should be interpreted in a way that nullifies the supremacy clause of art. VI, which applies to local as well as state regulation. See *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985); see, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973) (city ordinance imposing curfew on aircraft to regulate noise preempted by federal statute because "the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for . . . local controls").

## II. Local Regulation Would Obstruct Congress' Objectives

Local regulation also is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County v. Automated Med. Labs.*, 707 U.S. at 713 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even if a local ordinance has the same ultimate goal as a federal statute (e.g., protection of health and the environment), the local law is preempted "if it interferes with the methods by which the federal statute was designed to reach this goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1984); see also *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989), cert. denied, 110 S. Ct. 1781 (1990) (citing *Brown v. Hotel & Restaurant Employees & Bartenders International Union*, 468 U.S. 491, 501 (1984)) (even if statutory language or legislative history is unclear, preemptive intent can be inferred solely from deleterious effects on the federal scheme).

Allowing each local government in the United States to concoct its own scheme for regulating pesticides would make it impossible to maintain the comprehensive system of coordinated federal and supplementary state regulation which Congress sought to achieve through enactment of FIFRA. Equally important, local regulation would interfere with Congress' goal of providing the public, agriculture, and industry with cost-effective pest control. These are crucial points which go to the heart of preemption, but which petitioners and their *amici* (including the Solicitor General) completely ignore. Thus, to the extent, if any, congressional intent to preclude local regulation is unclear from FIFRA's language or legislative history, local regulation nevertheless is preempted because it would thwart Congress' objectives.<sup>12</sup>

<sup>12</sup> The dissenting opinions in *Mortier* focus on the minutiae of FIFRA's legislative history, but do not consider at all the actual conflict between local regulation and FIFRA's goals.



### A. Local Regulation Would Undermine the Comprehensive System of Federal-State Regulation Established by FIFRA

"The control and regulation of pesticides is a complex and difficult task." S. Rep. No. 334, 95th Cong., 1st Sess. 33 (1977). For this reason, Congress determined that its goals should be accomplished by giving sweeping pesticide regulatory authority to EPA — a federal agency that would have the necessary experience, expertise, financial resources, national perspective, and objectivity to determine which pesticides should be approved for use, and what restrictions on their use should, and should not, be imposed to maintain their benefits while minimizing any risks to applicators or the public. Furthermore, because regulating pesticides is not a job for amateurs, Congress extended supplementary authority only to States' pesticide regulatory agencies, which would have to meet certain federal statutory standards (*see* 7 U.S.C. §§ 136c(f), 136i(a)(2), 136v), and would coordinate their activities with EPA and each other.

Congress' overall objective in enacting FIFRA was to "regulate the use of pesticides to protect man and his environment," including "extend[ing] Federal pesticide regulation to actions entirely within a single State." S. Rep. No. 838, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. Through FIFRA, Congress intended to "provide for a more finely tuned control of pesticides which will *more easily permit their beneficial use and prevent their misuse.*" *Id.* at 5, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 3997 (emphasis added).<sup>13</sup>

<sup>13</sup> Congress made it clear that regulation of a pesticide should take into account "the benefits from its use." S. Rep. No. 838, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. As a result, FIFRA's statutory standard for registration — whether a pesticide will perform its function without "unreasonable adverse effects on the enviro-

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Petitioners and most of their *amici* clearly miscomprehend the expansive scope of FIFRA's statutory scheme (*see* Brief of Petitioners at 71).<sup>14</sup> Pursuant to its broad authority under FIFRA, EPA regulates registration, labeling *and* use of all pesticides, whether in interstate or intrastate commerce. *See*

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ment" — requires a balancing of the pesticide's "economic, social, and environmental costs *and* benefits." *See* 7 U.S.C. §§ 136a(c)(5), 136(bb) (emphasis added). Thus, "[d]ecisions under FIFRA are case-by-case analyses of risks and benefits and as such require *exhaustive consideration* of costs and benefits of permitting or denying use." S. Rep. No. 334, 95th Cong., 1st Sess. 32-33 (1977) (emphasis added). Most local governments are utterly incapable of such "exhaustive consideration."

<sup>14</sup> For example, petitioners and certain *amici* erroneously imply that pursuant to FIFRA, neither EPA nor the States can address local needs or concerns with respect to pesticides. To the contrary, insofar as particular areas within a State may have special conditions warranting localized regulation, "EPA may, where appropriate, in setting labeling and packaging requirements, give consideration to regional, State, and *local* needs." H. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971) (emphasis added). FIFRA also grants the States the authority to address local concerns. Pursuant to FIFRA § 24(c), a State is authorized, subject to EPA oversight, to approve additional uses of federally registered pesticides "to meet special local needs." 7 U.S.C. § 136v(c). Furthermore, the States' authority under § 24(a) to regulate sale and use of federally registered pesticides allows a State to impose localized restrictions on use. For example, a number of States in the Northwest and the South have adopted highly localized restrictions on timing of phenoxyherbicide applications in order to prevent damage to nontarget crops. As another example, California and Arizona have restricted use of cotton dessicants in certain areas of those States in response to local concerns about the odor of such pesticides.

Thus, there is no need for local governments to regulate pesticides, even if local conditions warrant localized restrictions. Both EPA and a State's pesticide agency have authority to adopt and enforce such restrictions, and unlike individual local governments, have the necessary scientific expertise and other resources, and are in a position to ensure that localized restrictions do not conflict with each other or adversely impact other localities within the State.



7 U.S.C. § 136a(a). This encompasses extensive data requirements for pesticide registration, including product chemistry, toxicology, environmental fate, and residue data;<sup>15</sup> the content, wording and format of pesticide labels and labeling, including hazard warnings, safety precautions, and protective equipment requirements;<sup>16</sup> classification of pesticides as restricted-use products, and standards for training and certifying applicators of such products;<sup>17</sup> post-registration scientific review of pesticide risks and benefits;<sup>18</sup> data call-ins to fill any data gaps, and reregistration of previously registered products;<sup>19</sup> standards and procedures for suspension and cancellation of problem pesticides;<sup>20</sup> regulation of pesticide transportation, storage and disposal;<sup>21</sup> and enforcement.<sup>22</sup> To carry out this comprehensive regulatory program,<sup>23</sup> EPA has a budget of \$95 million and a pesticide staff of 1,000 located at the Agency's Headquarters and in ten Regional Offices.

<sup>15</sup> See 7 U.S.C. § 136a(c)(2); 40 C.F.R. pt. 158 (1990).

<sup>16</sup> See 7 U.S.C. § 136a(c)(5); 40 C.F.R. pt. 156 (1990).

<sup>17</sup> See 7 U.S.C. §§ 136a(d), 136i; 40 C.F.R. § 152.160 (1990); 40 C.F.R. pt. 171 (1990); see also 55 Fed. Reg. 46,890 (1990).

<sup>18</sup> See 7 U.S.C. § 136a(c)(8); 40 C.F.R. pt. 154 (1990).

<sup>19</sup> See 7 U.S.C. §§ 136a(c)(2)(B), 136a-1; 40 C.F.R. § 152.144 (1990); see also 54 Fed. Reg. 18,076 (1989).

<sup>20</sup> See 7 U.S.C. § 136d; 40 C.F.R. pt. 164 (1990).

<sup>21</sup> See 7 U.S.C. § 136q; 40 C.F.R. pt. 165 (1990).

<sup>22</sup> See 7 U.S.C. §§ 136j, 136l, 136w-1, 136w-2; 40 C.F.R. pt. 168 (1990).

<sup>23</sup> Whether the statutory scheme enacted by Congress is comprehensive or extensive is hardly an issue of fact, much less a disputed one, as petitioners suggest. Brief of Petitioners at 60 n.15. Indeed, this Court has observed that in 1972 Congress transformed FIFRA into a "comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 991. Furthermore, petitioners' belief that "federal and state regulation of pesticides has been shoddy" (*id.* at 69) does not negate federal preemption. If petitioners or their amici want the statute changed, they should raise their contentions with Congress, not with this Court.

As discussed above, FIFRA also grants supplementary regulatory authority to the States, subject to certain EPA oversight, to further regulate sale and use (but not labeling) of federally registered pesticides. See 7 U.S.C. §§ 136c(f), 136i, 136v. Pursuant to this authority, every State has created one or more pesticide regulatory agencies, which closely coordinate their activities with EPA.<sup>24</sup> See generally 7 U.S.C. § 136u ("State Cooperation, aid, and training").

Local regulation would seriously undermine this comprehensive statutory scheme. It would supplant federal-state regulation with a bewildering multitude of disparate, overlapping, scientifically unwarranted, ill-considered, poorly drafted, onerous, costly, and politically motivated ordinances that would discourage, delay, disrupt or prevent application of beneficial, EPA and state-approved pesticides. In so doing, local regulation would effectively supersede federal and state regulatory determinations regarding, for example, whether a particular pesticide poses unacceptable risks for a particular use; what restrictions on application or use of the pesticide are adequate to protect the public; whether the pesticide should be applied only by or under the supervision of certified applicators, and what the requirements for training and certification of applicators should be; and what warnings or notifications should be provided in connection with use of the pesticide, and to whom, when, and in what manner.<sup>25</sup> These and similar EPA or state regulatory determina-

<sup>24</sup> To facilitate federal-state coordination, EPA has established the State FIFRA Issues Research and Evaluation Group ("SFIREG"), an advisory committee. In addition, the States coordinate their pesticide regulatory activities with each other through groups such as the National Association of State Departments of Agriculture ("NASDA"), the Association of American Pesticide Control Officials ("AAPCO"), and the Association of Structural Pest Control Regulatory Officials ("ASPCRO").

<sup>25</sup> Contrary to the suggestion of some of petitioners' amici, who pretend that FIFRA's expansive regulatory scope is limited to registration of pesticides, restrictions on pesticide use, including notification and posting (Footnote continued on next page)

tions would become meaningless wherever a local government attempted to decide for itself how that pesticide should be regulated. "It is unlikely — to say the least — that Congress intended to establish such a chaotic regulatory structure." *International Paper Co. v. Ouellette*, 481 U.S. at 497.

Even though local regulation would wreak havoc with the scheme of federal-state regulation established by FIFRA, local governments are *not* in a better position than EPA or a State's pesticide agency to know how to protect their citizens from the risks, if any, of pesticides that are applied in accordance with

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(Footnote continued from previous page)

requirements, fall squarely within the purview of FIFRA's federal-state regulatory scheme. See *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 117, 119 (2d Cir. 1989) (FIFRA § 24 permits States to regulate sale and use of pesticides through public notification requirements). Furthermore, local restrictions on pesticide use, including especially local notification and posting requirements, would have much more than an "incidental" effect on EPA or state regulation of pesticide use. See *Professional Lawn Care Ass'n*, 909 F.2d at 932 (if a local ordinance "imposes requirements that pesticide users must fulfill, and practices they must follow, before and after applying pesticides . . . [it] is an attempt by a local government to regulate pesticides and their use"). Moreover, posting and notification of pesticide applications is actually regulated by EPA and the States, and therefore, local posting and notification requirements would be preempted even under the narrow view of preemption advocated by certain of petitioners' amici (see, e.g., Brief of Amici Curiae Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado at 25). More specifically, pursuant to its authority under FIFRA, EPA has proposed regulations regarding posting of pesticide applications and notification to workers in farms, forests, nurseries, and greenhouses. See 53 Fed. Reg. 25,970, 26,008 (1988). In addition, pursuant to their authority to regulate pesticide use under FIFRA § 24(a), 7 U.S.C. § 136v(a), many States have adopted their own uniform, statewide posting and notification requirements, which typically govern application of pesticides used in structural pest control as well as in agricultural and horticultural uses. See, e.g., *New York State Pesticide Coalition v. Jorling*. Local posting and notification requirements are preempted even in States which have decided not to adopt such requirements.

EPA-approved label directions, restrictions, and precautions. As Congress recognized, the vast majority of local governments, unlike EPA and state pesticide agencies, do not have the resources and expertise to review extensive toxicology and other data, and to make well-informed regulatory decisions regarding a pesticide's use. See S. Rep. No. 838, 92d Cong., 2d Sess. at 16-17, reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4008. Thus, local governments would be arbitrarily upsetting EPA's and state agencies' carefully balanced decisions as to which restrictions should — and should not — be imposed on particular pesticides (or pesticides in general) and on those who apply them. Local regulation is preempted, therefore, because it would be an obstacle to accomplishment of the objectives which Congress sought to achieve through FIFRA's federal-state scheme of regulation.

#### B. The Regulatory Chaos Ensuing from Local Regulation Would Prevent Cost-Effective Pest Control

"An overriding concern of FIFRA is that pesticides should be available to meet pest control needs . . . for public health, agricultural production, food safety, and other reasons." S. Rep. No. 334, 95th Cong., 1st Sess. 3, 5 (1977). Congress reaffirmed this goal when it amended the Act in 1988, explaining that the purpose of the amendments was

to strengthen the protection of public health and the environment; to increase public confidence that pesticides are approved and used in a manner consistent with current health and safety requirements; [and] to ensure that pesticide users, including agricultural producers, will have access to the effective and affordable products they need on the farm, in the workplace, and at home . . . .

H. Rep. No. 939, 100th Cong., 2d Sess. 28, reprinted in 1988 U.S. Code Cong. & Admin. News 3474, 3476-77 (emphasis



added); *see also* S. Rep. No. 346, 100th Cong., 2d Sess. 6 (1988).

In addition to destroying the federal-state scheme of regulation, however, local regulation would sabotage Congress' goal of cost-effective pest control. It would subject users and commercial applicators of pesticides, and also the companies that distribute them, to a morass of unnecessary, conflicting, and burdensome requirements and restrictions that would impair or impede timely, affordable, efficacious pest control. The regulatory chaos that local regulation would engender underscores the wisdom of Congress' decision to preclude all pesticide regulation below the state level:

### 1. Multiple Ordinances

Most commercial applicators, whether structural, agricultural, or industrial, are highly mobile, and operate in dozens, if not hundreds, of local jurisdictions. They must do this in order to survive economically. This is especially true since the vast majority of structural pest control operators (upon whom the public heavily depends), and custom and aerial applicators (upon whom today's farmers and electric utilities heavily depend), are small businesses with slim profit margins. Requiring these companies to comply with a different set of pesticide regulations in every village, town, city or county which they serve would transmogrify their day-to-day business operations into a logistical nightmare.

Routing and scheduling a company's limited number of applicators through such a regulatory maze would be extraordinarily complicated. For example, if local regulation were allowed, an individual structural pest control operator, who often has to service homes or buildings in ten towns in two or three counties on a single day, could be confronted with a dozen sets of posting and notification requirements. Similar multiple requirements could affect custom applicators responsible for controlling and maintaining rights-of-way for electric power

transmission and distribution lines, which encompass geographic corridors stretching for miles and typically span numerous political subdivisions within a single State.

Each set of local posting and notification requirements could differ regarding the size, color, content, and language of warning signs; where in, on, or near a building or site they must be placed; how far in advance of an application they must be posted; and how long after an application they must remain. In addition, each local jurisdiction could have its own restrictions regarding which pesticides can be used, or whether they can be tank mixed or combined with other pesticides; or whether a permit must be obtained prior to making a specific application, and if so, what information must be provided in advance to the local government, and when; or whether applicators must meet local certification and training requirements in order to use a particular pesticide. Besides attempting to actually comply with each local jurisdiction's requirements, the tracking of such requirements, educating applicators regarding them, and maintaining adequate records to document compliance would be formidable tasks, but necessary in order to avoid local enforcement actions and liability suits based on alleged violations of local restrictions.

As a result of the foregoing, multiple ordinances would make it impossible for many pest control companies and custom applicators to deliver timely pesticide services. Most commercial applicators either would have to avoid servicing locally regulated areas altogether, or would have to pass the substantial costs of compliance on to those pest control customers who could still afford professional service. Either way, cost-effective pest control would be unavailable. Furthermore, if a local ordinance did not cover do-it-yourself pest control, homeowners or other untrained individuals might have to attempt pesticide applications themselves, thereby greatly increasing the potential



for misuse and the resultant risk of personal or environmental injury.

## 2. Overlapping Ordinances

The difficulty of complying with multiple pesticide regulations in neighboring jurisdictions would be exacerbated by the fact that many units of local government overlap. For example, if local regulation were allowed, a single farm could be subject to overlapping restrictions imposed by the township and county in which it is located, and also by power, irrigation, and other special governmental districts. Similarly, a high school cafeteria could be subject to overlapping regulations adopted by an independent school and a public health district, and by the city and county. Just determining which sets of pesticide regulations are applicable to a particular structure or farm would be a complex undertaking.

## 3. Conflicting or Inconsistent Ordinances

As if multiple and overlapping pesticide ordinances would not be enough of a problem, it is highly probable that local regulations would conflict or be inconsistent with each other, and with federal and state requirements. Indeed, the rationale for local regulation espoused by petitioners and their *amici* (a rationale which Congress flatly rejected), is that every unit of local government needs to protect its constituents by deciding for itself precisely how pesticides should be regulated within its geographic boundaries.

Local ordinances which conflict or are inconsistent with each other could have serious public health or economic consequences. For example, the recent encephalitis outbreak in Florida required prompt, widespread, uniform aerial application of pesticides to control disease-carrying mosquitoes. That would have been impossible to accomplish if there had been conflicting or inconsistent local regulations governing which pesticides could be applied, by whom, where, when, and

how. Moreover, if even a single town or county in Florida had prohibited or delayed a necessary application, the untreated area would have become a refuge for the infected mosquitoes. Similarly, if there were conflicting or inconsistent local regulations in California, cost-effective control of Medflies, which have plagued the agricultural economy in that State, would be impaired.

There also would be dire consequences if local governments were free to impose requirements which conflict with EPA label precautions, or with other federal or state restrictions. For example, local ordinances which fail to take into account EPA-imposed reentry periods for certain structural fumigants or agricultural chemicals could jeopardize the safety of the public or workers.

As discussed above, one of Congress' recently articulated goals for FIFRA is "to increase public confidence that pesticides are approved and used in a manner consistent with public health and safety requirements." H. Rep. No. 939, at 28, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3477. Local pesticide ordinances, however, especially when they conflict with each other or with EPA or state regulatory determinations, would erode public confidence by creating public confusion about pesticides and their risks. This is another reason why pesticide regulation below the state government level would conflict with FIFRA's purposes.

## 4. Onerous Ordinances

Through FIFRA, Congress has sought to achieve one of the "laudable goals of contemporary environmental legislation: Regulatory reform — *lessening burdens on the private sector and simplifying the regulatory process.*" 44 Fed. Reg. at 4352 (emphasis added). Local regulation, however, would have exactly the opposite effect, burdening the public, the pest control industry, and agriculture with a myriad of requirements and restrictions, none of which EPA or state pesticide agencies have

determined are necessary. A good example of an onerous local ordinance is the one involved in this case, which includes permitting provisions which are so cumbersome and elaborate that they can barely conceal their true purpose — to prevent or discourage the use of EPA-registered and state-approved pesticides.

The *amici curiae* in no way underestimate the creativity that local governments would display in devising their own burdensome pesticide regulatory schemes, especially when their actions are dictated by anti-pesticide groups, which for the most part have been unsuccessful in influencing the regulatory decisions of the professionals employed by EPA and state pesticide agencies. Thus, unless FIFRA preemption of local regulation is affirmed, Congress' efforts to centralize, standardize and modernize pesticide regulation, and to make it more scientific, better balanced, and less political and emotional, will be set back at least twenty years.<sup>26</sup>

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<sup>26</sup> The *amici curiae* submitting this brief strongly believe that FIFRA preempts all local regulation of pesticides. If, however, the Court should be disinclined to so hold, the *amici* urge the Court not to find or in any way suggest that local governments have blanket regulatory authority over pesticides. Instead, the Court should make it clear that its ruling in this case does not foreclose future preemption challenges to local ordinances, requirements, or restrictions which conflict or interfere with federal or state regulation of pesticides. It should be noted that this is a point conceded by the Public Citizen Litigation Group in its *amicus* brief, which merely opposes blanket preemption (see Brief of *Amici Curiae* Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado at 25).

## CONCLUSION

For the foregoing reasons, the *amici curiae* urge affirmance of the Wisconsin Supreme Court's holding that FIFRA preempts any and all local regulation of pesticides.

Respectfully submitted,

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No. 89-1905

**In The  
Supreme Court of the United States  
October Term, 1990**

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**WISCONSIN PUBLIC INTERVENOR  
and TOWN OF CASEY,**

Petitioners,

v.

**RALPH MORTIER, et al.**

Respondents.

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**On Writ of Certiorari To The  
Supreme Court of Wisconsin**

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**BRIEF OF *AMICUS CURIAE*  
GREEN INDUSTRY COUNCIL  
IN SUPPORT OF RESPONDENTS**

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### QUESTION PRESENTED

Does the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §136 *et seq.*, preempt the regulation of pesticide use by local units of government?

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## INTEREST OF AMICUS

The Green Industry Council ("GIC") is a not-for-profit business organization representing the interests of the New England green industry: interior and exterior landscape design, contracting and management firms; arborists; nurserymen; and turf managers. GIC is an organization of twelve business organizations: its members include such groups as the Irrigation Association of New England, the Massachusetts Association of Lawn Care Professionals, the Associated Landscape Contractors of Mass., the Mass. Arborists Association, the Golf Course Superintendents' Association of New England, and the Mass. Nurserymen's Association. The Council represents the common interests of the member firms of these organizations before legislatures and regulatory agencies and in court. GIC addresses such issues as responsible integrated pest management; professional certification and licensure; water conservation; protecting endangered species; and recycling and composting. The Council supports educational and research programs and promotes the adoption of new techniques and products which ensure the public safety and protection of the environment.

Many of the firms which are members of these business organizations use pesticides in hundreds of cities and towns in New England. These firms are committed to enhancing and caring for our landscape and environment. They use pesticides only as necessary and as part of integrated pest management programs which comply with all federal and state laws. However, if these member firms were faced with hundreds of inconsistent ordinances adopted by local governments with little or no access to technical expertise concerning pesticides, it will become impossible for them to operate in many localities. The Council and its members are also concerned that if the decision below is reversed, ignorant and inconsistent local requirements will result in damage to the environment by preventing the use of new and safer integrated control measures. Therefore, the Green Industry Council seeks to draw to this Court's attention some of the adverse effects such

ordinances could have in the real world, effects that Congress not only did not intend when it adopted FIFRA, but which the Council believes it intended to prevent by preempting local regulation of pesticide use.

The parties have each filed with the Court Clerk general consents to the filing of amicus briefs. Therefore, Amicus Green Industry Council has the consent of the parties to the filing of this brief.

### SUMMARY OF ARGUMENT

Local regulation of pesticide use is impliedly and expressly preempted by FIFRA. Some of the confusion encountered by the lower courts on this issue can be clarified by reversing the usual order of preemption analysis and examining implied preemption first. In FIFRA Congress constructed a sweeping, comprehensive statutory scheme which assigns to the states specific regulatory roles within that federal scheme. Congress deliberately assigned no role to local governments because it concluded that local regulation would lack necessary technical expertise and would interfere with interstate commerce. These concerns were realistic. Inept and inconsistent local regulation can have the unintended effect of damaging the environment rather than protecting it further.

In the interests of federalism and as the result of painstaking and prolonged negotiations among contending interest groups, Congress included express statutory language in FIFRA that assigns a limited role for the states. FIFRA is precisely the sort of federal regulatory program which occupies the field to the exclusion of all state or local regulation which Congress has not expressly exempted from preemption.

This comprehensive federal background accounts for the peculiar phrasing of the express preemption clause, 7 U.S.C. §136v, which primarily speaks of what the states are authorized to do in this field, rather than what they are preempted from doing. Congress structured the state role in this fashion to strike a balance among competing concerns of pesticide regulation, environmental

protection and federalism. Thus, in the field of pesticide regulation, the states are restricted to the role which Congress assigned to them in the statutory script. In light of the structure and logic of FIFRA, because no express statutory language saves local regulation from preemption, such regulations are preempted.

Preemption of local regulation was not accidental. Congress considered and rejected inclusion in FIFRA of statutory language which would have exempted local as well state regulation of pesticide use. When in crafting a statute Congress knowingly rejects language which would expressly accomplish a certain result, the statute as adopted should not be judicially construed to accomplish that very result. In FIFRA Congress deliberately rejected local regulation of pesticide use because it felt that localities would generally lack the ability to make the detailed technical evaluations of the environmental and economic costs and benefits of pesticides which are the centerpiece of the complex FIFRA regulatory scheme. Absent such expertise, local regulation of pesticide use can actually harm the environment, as well as interfere with interstate commerce.

### ARGUMENT

#### I. IMPLIED PREEMPTION

Amicus Green Industry Council agrees with the Respondents' arguments that FIFRA preempts local regulations of pesticide use. In this brief, however, the Council will employ an alternative approach that reaches the same result by looking first at implied preemption and then at express preemption.

The courts which have looked at this issue have divided primarily over the question of whether in light of the statutory language and structure, and legislative history of FIFRA, the lack of a explicit statement in the statute that "local regulations are preempted" or "that local regulations are not preempted" is to be construed as supporting or rejecting preemption. The split in the courts which have considered that issue demonstrates that the



crucial analytical question is what is the default assumption.<sup>1</sup>

#### A. *The Standard of Implied Preemption*

Congress may indicate an implied intent to occupy a regulatory field, thereby displacing all state and local laws on the same subject. In determining whether such implied preemption exists, the Court looks to the structure, purpose and legislative history of the federal statute. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1983); *Hines v. Davidowitz*, 312 U.S. 52, 78, 79 (1941). This review may reveal a number of different, alternative indications of an implied congressional intent to supersede state and local law.

For instance, the requisite intent has been found where the federal regulatory scheme is so pervasive as to lead to the reasonable inference that Congress left no room for the states to supplement it other than by fulfilling whatever role, if any, the federal statute itself provides for state law. *Fidelity Federal Savings & Loan v. De La Cuesta*, 458 U.S. 141, 153 (1982). In

<sup>1</sup> The courts which have held that FIFRA preempts local pesticide use regulations have concluded that FIFRA's legislative history and/or structure demonstrate that Congress intended it to preempt state and local regulations except insofar as Congress specifically authorized such regulation. *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 931, 933-934 (6th Cir. 1990), petition for cert. pending, No. 90-382; *Maryland Pest Control Ass'n v. Montgomery County*, 822 F.2d 55 (4th Cir. 1987) (Table) summarily aff'g 646 F. Supp. 109, 110 (D. Md. 1986); see also *Maryland Pest Control Ass'n v. Montgomery County*, 884 F.2d 160, 161-162 (4th Cir. 1989) (noting in attorney's fee litigation that it had previously affirmed district court holding that local pesticide ordinances "were invalid under FIFRA"), cert. denied, 110 S.Ct. 1524 (1990). On the other hand, the courts which have held that FIFRA does not preempt local regulations have relied on the principle that local health and safety regulations are not preempted unless Congress has made its intent to do so extremely clear. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 1160, 204 Cal. Rptr. 897 (1984); *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189, 1192 (Me. 1990); *Coparr Ltd v. City of Boulder*, 735 F. Supp. 363, 367 (D. Colo. 1989), app. pending, No. 89-1341 (10th Cir.) (argued Jan. 15, 1991).

addition, implied preemption will be found where the object Congress seeks to obtain by federal law and the character of the obligations imposed by it reveal the same preemptive purpose. *Id.* A Congressional intent to establish a uniform regulatory scheme in a statute, as "implicitly contained in its structure and purpose," also demonstrates a Congressional intent to occupy a field. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). "[T]he failure of a federal statute to speak directly to preemption does not necessarily create a gap for state or local regulation." *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d at 932 (citing *Adams Fruit Co. v. Barrett*, --- U.S. ---, 110 S.Ct. 1384, 1391, 108 L. Ed. 2d 585, 594 (1990)). In any of these situations, preemption will be found even when state or local regulation merely supplements and does not conflict with the federal statute. *Campbell v. Hussey*, 368 U.S. 297, 302 (1961).

#### B. *FIFRA is a Comprehensive Regulatory Scheme Which Restricts States to Federally Defined Roles.*

The statutory structure of FIFRA, its comprehensive scope together with the carefully crafted role that it gives to the states and its concern with statewide uniformity of pesticide regulation, demonstrates that Congress intended to preclude local regulation of pesticides.

The "intent behind the 1972 amendments [to FIFRA] was to enact sweeping federal pesticide regulation," *Professional Lawn Care Ass'n*, 909 F.2d at 933, and "to change FIFRA from a labelling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution and use of pesticides." H.R. Rep. No. 511, 92d Cong., 1st Sess. at 1 (1971). *Accord, Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984).

This broad intent is confirmed by analysis of FIFRA's provisions. Under FIFRA, EPA must register all pesticides before they can enter commerce. 7 U.S.C. §136a(a). Information on labeling, testing, chemical formulae, proposed use, and other

relevant items must be filed with EPA to obtain registration. 7 U.S.C. §136a(c).

Congress wrote into FIFRA a carefully defined role for the states. This role is the result of a balance struck in Congress among competing interest groups and points of view in the course of the two years of negotiations that led to the final Act. See discussion of the legislative history in the opinion of the Wisconsin Supreme Court, below, *Mortier v. Wisconsin Public Intervenor*, 154 Wis. 2d 18, 452 N.W. 2d 555, 558-61 (1990); and in the concurring opinion of Nelson, J., in *Professional Lawn Care Ass'n*, 909 F.2d at 937-940. In particular, Congress was concerned that the EPA and the states work together to secure "uniformity of regulations" on a statewide level. 7 U.S.C. §136i(b).<sup>2</sup> This provision manifests a clear congressional intent that EPA monitor the uniform regulation of pesticides, an intent that would be frustrated by the "muddle of thousands of local standards and regulations." *Professional Lawn Care*, 909 F.2d at 934. See S. Rep. No. 838, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3993, at 4008, 4013 (report of the Sen. Comm. on Agriculture and Forestry, hereinafter "S. Rep. 838"). Congress' choice of state level uniformity for pesticide use regulations was a compromise between having a single national standard, as Congress required for pesticide labeling, §136v(b), and an approach of letting every municipality in the country set its own standards, as some in Congress and some interest groups would have preferred, see S. Rep. No. 970, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS at 4111.

Congress accomplished this compromise by writing a script in which EPA directs the state actors in their federally assigned roles. FIFRA requires EPA approval of state applicator certification plans, 7 U.S.C. §136i, and enforcement plans, §136u. EPA "may enter into cooperative agreements with States" by which EPA will

<sup>2</sup> "The Administrator shall cooperate with . . . any appropriate agency of any State or political subdivision thereof, in carrying out the provisions of this Act and in securing uniformity of regulations." §136i(b).

"delegate" to a state "authority to cooperate in the enforcement" of FIFRA. 7 U.S.C. §136u(a). Similarly, Congress assigned to each states "primary enforcement responsibility for pesticide use violations," but only if EPA determines that the state "has adopted adequate pesticide use laws" and procedures and will keep required records and make reports to EPA demonstrating that it is playing its role adequately. §136w-1(a). EPA can revoke its delegated authority and take over enforcement of pesticide use requirements if a state does not live up to its plan. §136w-2(b). If a state does not have an EPA-approved plan to use authority delegated by EPA, then EPA itself "shall have primary enforcement responsibility" over pesticide use. §136w-1(c). Similarly, if a state certification plan does not meet EPA standards, EPA itself will revoke the state's authority and take over direct administration. §136i(b). EPA has promulgated detailed rules outlining the criteria for its approval of state plans. 40 C.F.R. §§171.3, 171.7. In each of these contexts, the term "State" makes sense only if it is read as meaning each of the fifty states (and District of Columbia and outlying territories, 7 U.S.C. §136(aa)) rather than the tens of thousands of local subdivisions such as the Town of Casey, which might wish to enact their own pesticides codes.

It is important to note that FIFRA speaks in terms of EPA "delegating" authority over pesticide use regulation to the states. If the states could adopt such regulations on their own sovereign authority, it would make no sense to talk of EPA delegating authority. However, the statutory language does makes sense if Congress in FIFRA intended to preempt nonfederal authority and then grant back to the states a limited delegation of federal authority under the terms and conditions of FIFRA.

FIFRA is no less comprehensive because it does not impose every conceivable limitation on pesticide use. Some, like the Petitioners here, do not believe that it goes far enough in restricting pesticides. But FIFRA is the result of a compromise between the viewpoint of persons like the Petitioners and other persons who believe that less regulation is appropriate for both the economy and the environment. This balance is reflected in FIFRA's language



and in its legislative history. Congress considered and rejected the goal of "complete" protection because such protection ignored the benefits of pesticide use. H.R. Rep. No. 511, at 5, 14; S. Rep. No. 838 at 3996-97. As the Senate Committee on Agriculture and Forestry commented, "appropriate pesticides properly used are essential to man and his environment. . . ." *Id.* at 3996.

Thus FIFRA is as comprehensive as it can be, consistent with Congress' intent to balance the risks of pesticide use against their benefits. It creates a regulatory scheme that governs the production, sale, distribution, storage, transportation, handling, use, application and disposal of pesticides. It represents a Congressional decision to concentrate authority on the federal level and administration on the federal and state levels. Except insofar as Congress has provided the limited exemption from preemption set out in 7 U.S.C. §136v, states and local governments are excluded from regulating pesticides. Because there is no explicit exemption from preemption for local ordinances in FIFRA they are preempted.

## II. EXPRESS PREEMPTION

### A. *The Phrasing of 7 U.S.C. §136v Shows that it Exempts from Preemption Only a Limited State Regulatory Role.*

The above argument for implied preemption of local authority is supported by the phrasing of §136v, titled "Authority of States." That section is not so much a preemption provision as it is an exemption from preemption provision. Section 136v begins by stating positively what a state "may" do concerning pesticide use regulation rather than starting with a prohibition: "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent that the regulation does not permit any sale or use prohibited by this Act." §136v(a). If, as Petitioners suggest, the default assumption is that states and local governments can regulate as they please absent a specific federal prohibition, Congress' statement of the authority of states would have begun with a list of the prohibitions it believed

necessary to impose. However, once it is understood that Congress intended FIFRA to occupy the field and intended that the states shall have only such authority over pesticide use as Congress gives back to them, the phrasing of §136v(a) makes perfect sense.

Similarly it makes sense that Congress followed through with this state-level approach by authorizing states (but not localities) to "provide registration for pesticides formulated for distribution and use within that State to meet special local needs if that State is certified by the Administrator as capable of exercising adequate controls to assure that such registration will be in accord with the purposes of the Act and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator." 7 U.S.C. §136v(c). Thus, FIFRA makes explicit provision for state attention to local needs in pesticide regulation and provides how that attention may be expressed.

As the Wisconsin Supreme Court noted, "without the language excepting 'states' from the effect of the law, states, as well as local government powers, might well be construed to be preempted." 452 N.W.2d at 560, n.18. It follows, therefore, that because Congress did not authorize local governments to regulate pesticide use, they do not have that authority.<sup>3</sup>

### B. *Congress Deliberately Chose Not to Exempt Local Regulation of Pesticides from Preemption in §136v.*

The absence of any reference to local regulatory authority in §136v is not accidental. As Respondents discuss in their brief, the legislative history of FIFRA demonstrates that Congress deliberately did not confer any regulatory authority over pesticides on localities because it did not want them to have any.

The original bill filed at the request of the Nixon Administration included a provision which would have expressly authorized local regulation of pesticide use. H.R. 4151, introduced

<sup>3</sup> For the reasons set forth at length in Respondents' brief, the term "state" in §136v cannot be construed to include local governments as well.



Feb. 10, 1971, *quoted in Maryland Pest Control v. Montgomery County*, 646 F. Supp. at 111-112. The House Agricultural Committee deleted that provision and explained that the Committee had deliberately rejected it because "the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, *supra*, at 16. The bill went to the Senate Agriculture Committee which agreed with this change and specifically noted that it was intended to bar local regulation of pesticide use:

Clearly, the fifty States and Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities, whether towns, counties, villages, or municipalities, have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On that basis, and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any an all jurisdiction and authority over pesticides and the regulation of pesticides.

Senate Agriculture and Forestry Committee, S. Rep. No. 838 at 4008.

The Senate Commerce Committee disagreed and proposed express language which would have authorized local regulation, S. Rep. No. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE & CONG. NEWS at 4111, but that language was deleted as a result of negotiations between the two Senate Committees. "Explanation of Compromise Substitute for the Text of H.R. 10729," 118 Cong. Rec. 32257-32258 (1972). The Senate and the House then enacted the language crafted and advocated by the Agriculture Committees.

In short, in the course of the legislative drafting process, Congress repeatedly considered and rejected language which would

have permitted local pesticide regulation. A statute should not be construed to achieve a result when Congress, considered and rejected specific proposed language which would have expressly accomplished that very result. "While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected." *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190, 220 (1983). *Accord*, L. TRIBE, CONSTITUTIONAL CHOICES, *Congressional and Constitutional Silences*, p. 41 (1985) ("Congress' prior or contemporaneous rejection of proposed *amending language* or other legislation that would have enacted the very interpretation of a statute that a litigant later claims a statute *did* enact" indicates that the interpretation is wrong (emphasis in original)).

### III. LOCAL REGULATION OF PESTICIDES WOULD DEFEAT THE CONGRESSIONAL PURPOSES OF FIFRA.

#### A. *Congress Intended Pesticide Regulation Decisions to Be Based on Thorough Consideration of Technical Evidence.*

The Petitioners contend that the declared intent of the Senate Agriculture Committee quoted above does not necessarily reflect the intent of Congress. However, the specific concerns expressed by the Agriculture Committee are entirely consistent with the fundamental overall approach that Congress took when it adopted FIFRA.

The Act requires detailed technical weighing of economic and environmental risks, costs and benefits of pesticides before a pesticide is registered for use and a similar cost-benefit analysis before a registered pesticide is banned. 7 U.S.C. §§136a, 136a-1, 136d. Congress instructs EPA to register an active ingredient if, after thorough consideration of all available scientific evidence, EPA finds that, among other things, the ingredient "will perform its intended function without unreasonable adverse effects on the environment; and . . . it will not generally cause unreasonable

adverse effects on the environment." §136a(c)(5)(C) and (D). In determining what data is needed to evaluate a pesticide, EPA must weigh complex environmental and economic factors. §§ 136a(c)(2), 136d(b). The Act contemplates a lengthy and expensive review process involving highly technical research and data. §136a (registration), §136a-1 (re-registration), §136d (suspension and cancellation). This technical analysis in the registration process is central to FIFRA's structure. It necessarily requires great technical expertise on the part of EPA as well as considerable amounts of time and money. *See, e.g.*, §136a-1 (re-registration process for a single pesticide can take several years; EPA empowered to charge re-registration fees of up to \$150,000).

Congress intended that not only EPA but the states as well play their role with technical excellence. EPA is to approve a state applicator certification plan only if it contains "satisfactory assurances" that the state "agency has or will have . . . qualified personnel necessary to carry out the plan" and that "the State will devote adequate funds to the administration of the plan." 7 U.S.C. §136i(a)(2)(B) and (C). Similarly, Congress instructed EPA to revoke the authority of a state to enforce pesticide use regulations if EPA determines that the state's program is inadequate. §136w-2.

The Petitioners claim that local ordinances are needed to protect public health because despite having spent millions of dollars and thousands of man-years of technical effort, EPA has completed its Congressionally-mandated examination of the costs and benefits of only a small fraction of the thousands of pesticides on the market. Petitioner's Brief at 63 - 68. If millions of dollars and thousands of man-years of research are indeed insufficient to resolve the complex environmental scientific and economic problems regarding pesticides in the thorough way that Congress wishes them resolved, then a town or village with little money and no expertise certainly will not be able to do the job.

*B. Experience Shows That Local Governments Are Generally Incapable of Making Such Complex Technical Decisions and That Their Attempts to Regulate Pesticides Would Frustrate FIFRA's Purposes.*

The Green Industry Council believes that if local governments were allowed to intrude into the field of pesticide regulation, then, rather than doing the job EPA has not been able to complete, in many instances, if not all, towns would substitute ignorance for intelligence, extremism for expertise, and panic for policy.

*1. Local Pesticides Regulation Could Harm the Environment.*

Uninformed and inconsistent local regulation of pesticides could damage the environment -- exactly what FIFRA is intended to prevent. This could happen in several ways. Most significantly, local regulations, by their sheer number and inconsistency as well as through the ignorance of those who promulgate them, could prevent introduction of new and safer pesticides and techniques of using them.

This risk is particularly significant for the developing techniques of "integrated pest management": an ecologically based approach to pest control which combines several different techniques to maintain pests below damaging levels. *See* EPA, INTEGRATED PEST MANAGEMENT OF TURF-GRASS AND ORNAMENTALS, (1989). Specific strategies of these evolving programs vary among crops and according to the seasons and weather but all have common components. Crops are monitored regularly to detect the level of infestation. The applicator must be ready to quickly and flexibly adapt the strategy to the latest conditions, taking into account the kind and quantity of the pests; the quantity of other creatures which are natural enemies of the pests; the stage of the crop; and the weather. Integrated pest management relies to a large extent on natural enemies of pests. Such enemies may be conserved by establishing a suitable habitat



and selecting and timing pest management techniques carefully, or they may be introduced from commercial sources. Other techniques of integrated pest management include reducing pests by "cultural controls" such as modifying planting, growing, and harvesting practices.

Integrated pest management strategies frequently include pesticides. The goal is to use the lowest effective amount of pesticides with the lowest toxicity to species other than the pests, including humans. This often requires using several different pesticides as conditions change through the year. The timing of the pesticide applications is crucial to provide the most effective control of the pests while minimizing impacts on natural predators.

In FIFRA, Congress has encouraged the use of integrated pest management by directing EPA to require that applicator certification programs make available instructional materials concerning integrated pest management. 7 U.S.C. §136i(c).

The keys to successful integrated pest management are variety, flexibility and timing. The user must be able to shift among several techniques, often including several different pesticides, depending on the conditions of the moment.

Multitudinous local regulations can frustrate this variety, flexibility and timing. The members of Amicus Green Industry Council, such as landscaping and lawn care firms, typically do business in dozens of local jurisdictions. In New England towns are small and numerous (351 in Massachusetts alone) and share authority with other local governments such as water districts and counties. If local pesticide regulations were allowed, green industry firms that want to abide by the law would face a labyrinth of hundreds of inconsistent regulations in hundreds of jurisdictions (some of them overlapping) administered by hundreds of obscure agencies. If a landscaping firm, for instance, discovers that a certain combination of pesticides is particularly effective under certain conditions, it would have to obtain approvals in each local jurisdiction for each pesticide. If the pesticide is new or otherwise unfamiliar to untrained local officials (and because there are thousands of pesticides, nearly all of them will be unfamiliar to

non-experts), the applicator firm will likely face long delays if not flat rejection.

Moreover, because local governments can devote only minimal resources to pesticide regulation, they often insist on early prior notification of each use of a pesticide in order to give themselves time to consider the proposed application. The members of Amicus Green Industry Council have encountered local ordinances and proposed ordinances that require pesticide applicators to file annual plans committing them up to a year in advance as to which pesticides they will use.<sup>4</sup> Such a requirement destroys any possibility of a flexible response to a sudden infestation or to unexpected weather. If the applicator were to attempt to prepare for such eventualities by listing in the annual plan every pesticide he might conceivably use, he would have to undergo local approval proceedings for each such pesticide in every local jurisdiction in which he does business.<sup>5</sup> Rather than invest time in endless local legal proceedings, the applicator may be forced to abandon integrated pest management and instead use a more familiar

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<sup>4</sup> For instance, the Town of Wellesley requires that, "Every applicator shall annually provide the Health Department a listing of all pesticides being used or planned for use within the Town. This list shall be supplemented by a copy of a material safety data sheet, a copy of the pesticide label, and the EPA fact sheet for the product. . . . Every applicator of pesticides must annually provide the Health Department with the registration classification of any pesticide to be applied within the Town of Wellesley." Copies of this ordinance and the other local ordinances cited in the notes below are on file with counsel for Amicus Green Industry Council.

<sup>5</sup> The Town of Leicester, Massachusetts, has recently demanded that at least one golf course submit a "Chemical Management Plan" which "utilizes integrated pest management techniques" and "shall contain provisions for unanticipated contingencies, and shall list all chemicals to be used or stored . . . and . . . shall also show proposed areas of application, proposed application schedule and proposed method of application and storage." The Town does not explain how businesses are supposed to anticipate "unanticipated contingencies." While Leicester has not enacted this demand as an ordinance, it could do so, as could any town, if local pesticide regulation is not preempted.



pesticide in whatever greater quantities are needed to kill the pests.

In addition to interfering with new and environmentally beneficial techniques, local governments, through ignorance, may force the use of relatively more hazardous pesticides by banning or restricting safer ones or may require that pesticides be used in inappropriate ways.

## 2. *Local Pesticide Regulations Would Interfere with Interstate Commerce.*

The experience of Amicus Green Industry Council and its members has also shown that local regulations threaten to interfere with interstate commerce. The Senate Agricultural Committee specifically noted this problem in discussing its reasons for drafting §136v in the form that was ultimately enacted. S. Rep. No. 838, *supra* at 4008. Congress also addressed this concern when it totally banned not only local but state regulation of pesticide labeling requirements. §136v(b).

Allowing thousands of local governments to promulgate inconsistent ordinances would interfere with interstate commerce. This is most clearly seen in local regulations regarding transportation of pesticides. A truck carrying pesticides down an interstate highway may pass through dozens of towns. If each town could impose different and inconsistent requirements on the construction, color and safety equipment of the truck, commerce in pesticides would grind to a halt. Even if each town could merely require a license and fee for transporting pesticides, the cumulative effect of dozens or hundreds of license fees would put transportor and applicator firms out of business, which certainly would interfere with interstate commerce.

Furthermore, different towns could take entirely different approaches to regulating pesticide use, requiring firms to modify their practices in various inconsistent ways and provide different information about the pesticides and their use. One town might

insist on registering the applicator company;<sup>6</sup> another would require registration of pesticides, demanding data over and above that required for federal and state registration;<sup>7</sup> a third might regulate the size and color of signs posted at application sites;<sup>8</sup> a fourth might set standards for loading of pesticides into trucks;<sup>9</sup> and a fifth might try to regulate every truck that transports pesticides through the community.<sup>10</sup>

In short, allowing local regulation of pesticide use would frustrate Congress' purposes in FIFRA to have pesticide regulations which are rationally justified on the best available technical

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<sup>6</sup> For instance, the Town of Wellesley Massachusetts requires that "All pesticide applicators operating in the Town of Wellesley must register with the Wellesley Health Department."

<sup>7</sup> In 1983 the City of Haverhill, Massachusetts adopted an ordinance requiring that

Any Public Utility desiring to use . . . herbicides must submit to the Board of Health an application for approval . . . which shall have with it evidence to establish that the said use will not create any public health hazard . . . . Said evidence shall consist of tests made of the proposed herbicides by a laboratory certified by the Environmental Protection Agency as being qualified and competent to determine whether the proposed use of such herbicide or its breakdown products will or will not create the said public health hazards. Among the submitted [sic] tests shall be bacterial tests such as the Ames Salmonella Test for mutagenicity and also tests of chronic exposure of one or more varieties of laboratory animals.

<sup>8</sup> The Town of Mansfield, Massachusetts requires that signs marking sites where pesticides are used on turf must be pink, despite the requirement of the Commonwealth of Massachusetts that persons applying pesticides to turf post yellow signs, 333 Code of Mass. Regs. 10.03(30).

<sup>9</sup> The Town of Mashpee, Massachusetts requires that users of pesticide trucks submit a "description of the manner whereby tank vehicle is to acquire water . . . ."

<sup>10</sup> The Town of Mansfield, Massachusetts commands that "All service vehicles must carry storm drain protective covers and one hundred (100) pounds of granular absorbent."

examination of risks, costs and benefits; to protect the environment and encourage safer pest management techniques; and to prevent interference with interstate commerce.

#### IV. CONCLUSION

The judgment of the Supreme Court of Wisconsin should be affirmed.

DATED: Boston, Massachusetts: March 28, 1991.

Respectfully submitted,  
GREEN INDUSTRY Council  
By its attorneys,

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990**

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**NO. 89-1905**

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**WISCONSIN PUBLIC INTERVENOR, and  
TOWN OF CASEY,**

*Petitioners,*

v.

**RALPH MORTIER and WISCONSIN FORESTRY/  
RIGHTS-OF-WAY/TURF COALITION,**

*Respondents.*

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**On Writ of Certiorari to the  
Wisconsin Supreme Court**

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**BRIEF OF AMICUS CURIAE  
THE WASHINGTON LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENTS**

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**INTERESTS OF THE AMICUS CURIAE<sup>1</sup>**

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in

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<sup>1</sup>Counsel for all parties have consented to the filing of all *amicus* briefs in this case. Their consents are on file with the Clerk of this Court.

Washington, D.C. with 120,000 members nationwide. WLF is committed to advancing the free enterprise system and to promoting the principles of judicial restraint. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in numerous cases affecting business. See, e.g., *Mobil Oil Exploration v. United Distribution*, 111 S.Ct. 615 (1991); *Pacific Mutual Life Insurance Cos. v. Haslip*, 59 U.S.L.W. 4157 (March 1, 1991); *Kansas and Missouri v. Utilicorp United Inc.*, 110 S.Ct. 2807 (1990); and *Ingersoll-Rand Company v. McClendon*, 111 S. Ct. 478 (1990).

In addition to its interests in issues affecting the free enterprise system, WLF devotes a substantial amount of time to issues relating to the proper interrelationship between the national and state governments. WLF believes that both the national and state governments have important roles to play in our federal system of government. WLF has appeared as *amicus curiae* before this Court on a number of occasions recently to urge that state and local governments be granted greater autonomy in their dealings with the national government. See, e.g., *Gregory v. Ashcroft*, No. 90-50 (decision pending 1991); *Howlett v. Rose*, 110 S. Ct. 2430 (1990); *Pennsylvania Department of Public Welfare v. Davenport*, 110 S. Ct. 2126 (1990); *United States v. Spallone*, 110 S. Ct. 625 (1990). In this case, however, WLF believes that a proper balancing between the powers of the federal government and local government requires that the decision below be affirmed.

Because of the unique perspective of WLF in its commitment to promoting a balance between state and federal rights and powers, this brief will bring relevant matter to the attention of the Court that may not be brought to the attention of the Court by other parties.

## STATEMENT OF THE CASE

WLF is, in the interest of brevity, omitting any detailed statement of the facts of this case. WLF adopts by reference the statement of facts contained in Respondent's brief.

In brief, in 1972 Congress enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.* That act provides a scheme of federal regulation of pesticides including the sale, use, storage, labelling, and export of pesticides. A portion of that statute provides that FIFRA is not intended to deprive a state of authority to regulate the sale or use of any federally registered pesticide in the state. 7 U.S.C. § 136v.

The town of Casey, Wisconsin enacted an ordinance which requires an individual to obtain a permit from the town prior to engaging in certain types of pesticide spraying. Mortier, a property owner in Casey, desired to spray a portion of his own land located in Casey with a pesticide. Mortier received a permit which precluded him from aerial spraying and limited the area in which he could spray. *Mortier v. Casey*, 452 N.W.2d 555, 556 (Wis. 1990).

Mortier joined with several organizations to challenge the Casey ordinance in court, arguing that the ordinance was preempted by FIFRA. The Circuit Court of Washburn County upheld the challenge. The Supreme Court of Wisconsin affirmed the decision of the Circuit Court, ruling that the Casey ordinance was preempted by FIFRA. *Id.* The Wisconsin Court found that while FIFRA "does not contain any express preemption language, it does, however, contain language which is indicative of congress' intent to deprive political subdivisions, like the



Town of Casey, of authority to regulate pesticides." *Id.* at 557. The court concluded that while the statutory language alone did not clearly manifest congressional intent to preempt local governments from regulating pesticide use, such an intent was manifested in the legislative history of FIFRA.

### SUMMARY OF ARGUMENT

FIFRA preempts local regulation of pesticide use. FIFRA is a comprehensive federal regulatory statute that controls the manufacture, distribution, labelling and use of pesticides. Congress has carved out important areas in which the states are permitted to regulate pesticides -- including pesticide use. Congress has also carved out some limited areas for local regulation -- but regulation of pesticide use is not one of those areas. FIFRA's regulation of pesticide use is so comprehensive that, in the absence of the statutory provision explicitly permitting states to regulate pesticide use, FIFRA undoubtedly would be construed as preempting such regulation even by states.

Petitioners argue that since FIFRA permits the states to regulate pesticide use, FIFRA also permits political subdivisions of the states to regulate pesticide use. However, Congress defined in the statute what it meant by "states." Political subdivisions of states are not included in that definition. Furthermore, the ordinary meaning of the word "state" does not include political subdivisions of states. Finally, Congress did make reference to local governments in several provisions of FIFRA. If Congress had meant to include subdivisions of states within its understanding of the word states, there would not have been any reason for Congress to make separate references to states and local governments within the rest of FIFRA.

While FIFRA is unusual in that it permits states to regulate in an area comprehensively regulated by the national government, it is not unique. Several other federal statutes also involve comprehensive federal regulation while tolerating continued regulation by the states. Courts examining those statutes have not hesitated to find federal preemption of local government regulation despite the absence of any preemption of state regulation.

Finally, the legislative history of FIFRA clearly demonstrates that FIFRA was intended to preempt local governments from regulating pesticide use. The Petitioners claim that the legislative history only demonstrates an "agreement to disagree" is premised upon the erroneous notion that the legislative defeats of the proponents of local regulation are meaningless. The legislative history indicates that both the proponents and opponents of local regulation believed that, as enacted, FIFRA preempted local governments from regulating pesticide use and that amendments to FIFRA would be necessary in order to change the preemptive force of FIFRA. The proponents of local regulation did propose such amendments, and those amendments were defeated.

### ARGUMENT

#### I. THE STRUCTURE OF FIFRA DEMONSTRATES THAT LOCAL GOVERNMENTS ARE PRE-EMPTED FROM REGULATING THE USE OF PESTICIDES.

Local regulation of pesticides is preempted by FIFRA. The structure of FIFRA demonstrates that it is a comprehensive federal regulatory statute that has carved out important areas for state regulation but does not permit local governments to regulate pesticide use.

The Supremacy Clause of the United States Constitution, Article VI, Clause 2, makes the Constitution, laws adopted by Congress pursuant to the Constitution, and treaties "the supreme Law of the Land." The Supremacy Clause grants the national government the power to decide the extent to which federal law preempts state law, so long as that preemption does not interfere with states' rights under the Tenth Amendment to the Constitution.

Congress has the power, under the Supremacy Clause, to preempt not only state but also municipal authority in a particular field. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Furthermore, preemption analysis is the same for local ordinances as it is for statewide laws. *Hillsborough County, Fla. v. Automated Medical Laboratories*, 471 U.S. 707, 713 (1985).

The touchstone in deciding whether federal preemption has occurred is Congressional intent. *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988); *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). Preemption is most clear when Congress explicitly prohibits state and local governments from enacting legislation in a given area. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990). Even in the absence of express statutory language, Congressional intent to preempt state and local laws can still be inferred from the presence of a pervasive scheme of regulation in a particular field. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973).

When Congress amended FIFRA in 1972, a House committee reported to the full House of Representatives that the amended statute would "change FIFRA from a

labelling law into a *comprehensive* regulatory statute that will henceforth more carefully control the manufacture, distribution, and use of pesticides." H.R. Rep. No. 511, 92nd Cong., 1st Sess. at 1 (1971) (emphasis added). A number of courts that have examined FIFRA have concurred that the 1972 amendments transformed FIFRA into a comprehensive regulatory scheme. *Maryland Pest Control v. Montgomery County*, 646 F. Supp. 109, 110 (D. Md. 1986) *aff'd* 822 F.2d 55 (4th Cir. 1987); *National Agricultural Chemicals Association v. Lormanger*, 500 F. Supp. 456, 468 (E.D. Cal. 1980). The Wisconsin Supreme Court, while not basing its decision upon the pervasiveness of the federal regulation, also found that in amending FIFRA in 1972 Congress adopted a pervasive scheme regulating pesticide use. *Mortier v. Town of Casey*, 452 N.W.2d 555, 557 (Wis. 1990).

The structure of FIFRA, taken as a whole, demonstrates that Congress intended to permit the states and local governments to regulate pesticides only in certain areas where Congress explicitly permitted those governments to do so. In the absence of such explicit permission, FIFRA so occupies the field of pesticide regulation that all state and local regulations in that area would be preempted.

The pervasiveness of FIFRA's regulatory scheme is shown by the comprehensiveness of its reach. FIFRA requires registration of pesticides with the federal Administrator, 7 U.S.C. § 136a; requires the classification of pesticides by the federal Administrator, 7 U.S.C. § 136a(d); requires the certification of applicators of pesticides, 7 U.S.C. § 136b; requires registration of pesticide producers, 7 U.S.C. § 136e; requires inspection of establishments where pesticides are held for distribution or sale, 7 U.S.C. § 136g; makes certain uses of pesticides illegal, 7 U.S.C. § 136j; regulates the import and export



of pesticides, 7 U.S.C. § 136o; and regulates the disposal and transportation of pesticides, 7 U.S.C. § 136q.

The extensive federal regulation of the pesticide field clearly qualifies as a comprehensive scheme for purposes of preemption analysis. Furthermore, FIFRA provides for no state or local role in many aspects of the regulatory scheme. 7 U.S.C. §§ 136a, 136d, 136e, 136g, 136o, and 136q.

The total structure of FIFRA demonstrates that but for the carefully drawn exceptions drafted by Congress, the area of pesticide regulation would be totally preempted by the national government. In some areas Congress carved out important and extensive roles for state governments and very limited roles for local governments.

The roles of the states under FIFRA vary depending on the subject matter of the pesticide regulation. FIFRA grants the states some limited powers subordinate to the national government as part of the federal regulatory scheme. For example, the states may submit plans to the federal administrator for approval of a state plan to certify applicators of pesticides. 7 U.S.C. § 136b.

The potential for state governments to exercise more far-reaching powers under FIFRA is contained in a provision of FIFRA which authorizes (but does *not* require) the Administrator of FIFRA (head of the EPA) to enter into cooperative agreements with the states in the enforcement of the act and to assist State agencies in programs for the certification of applicators consistent with the standards the Administrator prescribes. 7 U.S.C. § 136n.

The final and most significant power the states have under FIFRA is contained in § 136v, "Authority of States." Part (a) of that section states:

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.

However, § 136v also contains limits on that authority of the states by prohibiting the states from imposing labeling and packaging requirements on pesticides.

In a very limited number of situations FIFRA recognizes a role for local governments. The Administrator is obligated to cooperate with other federal agencies, the states, and political subdivisions of states in carrying out the provisions of the act and in "securing *uniformity* of regulations." 7 U.S.C. § 136t(b) (emphasis added). The administrator may designate state or local governments to conduct record inspections of pesticide producers. 7 U.S.C. § 136f. Local governments along with the states also have one other minor role under FIFRA: the Administrator is to cooperate with state and local agencies in devising a national plan for monitoring pesticides. 7 U.S.C. § 136r(b).

The role of states under FIFRA differs sharply from that of local governments. In drafting FIFRA, Congress carved out certain spheres of substantial power for the states in pesticide regulation.

The role of local governments in pesticide regulation, however, is extremely limited. Congress carved out only a few narrow areas in which it permitted local governments to participate in the federal scheme of pesti-



cide regulation. Regulating the *use* of pesticides is not one of those areas. The regulation of pesticide uses is reserved to the national government and state governments.

While it is true that FIFRA does not affirmatively state that local governments are prohibited from regulating pesticide use, that prohibition is clear by looking at the total structure of the statute. Had Congress not intended some preemption of local government pesticide regulation, it would not have found it necessary to explicitly permit local governments certain limited roles in other areas of pesticide regulation. Furthermore, if the regulation of pesticide use by local governments is not preempted by FIFRA, the grant of authority to the states to regulate pesticides would be meaningless. Congress explicitly granted to the Administrator and the states the power to regulate pesticide use; nowhere is that authority granted to local governments. Clearly, the doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another) applies in this case. Otherwise much of the statute is meaningless.

## II. THE CONGRESSIONAL GRANT OF AUTHORITY TO THE STATES TO REGULATE PESTICIDE USE WAS NOT A GRANT OF SUCH AUTHORITY TO LOCAL GOVERNMENTS.

The Petitioners have equated the term "state" with the political subdivisions of a state, thereby hoping to avail themselves of FIFRA's accommodation of state regulation of pesticide use. Petitioners argue that when Congress permitted the states, pursuant to § 136v, to regulate the use of pesticides, it also granted such permission to local governments and other subdivisions of local governments. However, such a reading of the term "state" is inconsis-

tent both with the use of the word in the statute and with the plain and ordinary meaning of that word.

What Congress meant by the word "state" is no great mystery:

**State.** -- The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

7 U.S.C. § 136(aa) (emphasis added).

This Court need go no further in attempting to find out what Congress meant by the term "state." Congress did not include political subdivisions of states within the definition of "state."

In discerning the intent of Congress, the words of a statute should be accorded their plain meaning. Congress is presumed to use words in their ordinary sense unless it expressly indicates the contrary. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944). There is nothing that could be plainer than the meaning of the word "state," especially since Congress has itself defined the word.

The definition of "state" provided by Congress is consistent with the ordinary meaning of the term. "State" does not ordinarily include legislative subdivisions. *Local 1564 v. City of Clovis*, 735 F. Supp. 999, 1004 (D.N.M. 1990); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987); *Johnson v. Southern Ry. Co.*, 654 F. Supp. 121, 122 (W.D.N.C. 1987).

The intent of Congress in its use of the word "state" also is manifested by Congress's explicit references to local governments in three sections of FIFRA. If "states" were equated with local governments under FIFRA, then there would have been no reason for Congress ever to mention local governments.

### III. OTHER STATUTES THAT PERMIT STATES TO ACT WITHIN A SCHEME OF FEDERAL REGULATION HAVE BEEN INTERPRETED TO PROHIBIT LOCAL REGULATION.

The tension between federal and state powers is a continuing one. However, as discussed above there is no question that short of a Tenth Amendment infringement, the federal government can preempt state and local government from enacting and enforcing legislation in any given area. FIFRA is in many ways an experiment in joint federal-state regulation. FIFRA is a fairly unusual statute in that it explicitly authorizes the states to regulate in a field that the federal government is regulating extensively. However, FIFRA is not unique. In several other areas of the law, courts have been faced with analogous preemption problems, and in those situations the courts have not hesitated to find that local governments are preempted from taking actions that states are permitted to take under the respective statutes.

One example of Congress granting powers to the states under a comprehensive regulatory scheme is the area of railroad safety. Congress in enacting railroad safety legislation authorized the states to accommodate local safety concerns by imposing regulations more stringent than the federal regulations, provided that the state regulations are not totally incompatible with federal regulations. Federal Railroad Safety Act, 45 U.S.C. § 434 (1986).

In interpreting the railroad safety statute, numerous courts have held that the statutory provision that permits state regulation does not permit regulation by local governments. *Chesapeake & Ohio Ry. Co. v. City of Bridge-man*, 669 F. Supp. 823 (W.D. Mich. 1987) ("since municipalities are not included in this preemption exception, municipalities are preempted from passing more stringent train speed limits"); *Johnson v. Southern Railway Co.*, 654 F. Supp. 121, 122-23 (W.D. N.C. 1987) ("[the act] says a State may adopt the law, rule, or regulation. It does not say the State may delegate to the cities and towns in the State the power to do so"); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987); *Sisk v. National Railroad Passenger Corp.*, 647 F. Supp. 861, 865 (D. Kan. 1986). An earlier version of that legislation was similarly interpreted by the courts to deny local governments the power to enact railroad safety ordinances. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

Another statute under which Congress has pervasively regulated an area of law, but still carved out a limited role for the states, is the National Labor Relations Act (NLRA), 29 U.S.C. §§ 141 *et seq.* The NLRA is a comprehensive statute regulating the conduct of labor relations for employers and employees engaged in interstate commerce. However, Section 14(b) of that act (29 U.S.C. § 164(b)) permits the states to prohibit union security agreements by enacting right-to-work laws.

In at least four states where there were no right-to-work laws, local governments enacted ordinances to attempt to prohibit union security agreements. Faced with challenges to those ordinances, three courts found that the grant of power to the states to enact "right-to-work" laws does not permit local governments to enact right-to-work

ordinances. *Local 1564 v. City of Clovis, N.M.*, 735 F. Supp. 999 (D.N.M. 1990); *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360 (Ky. App. 1965); *Grimes & Hauer, Inc. v. Pollock*, 163 Ohio 372, 127 N.E.2d 203 (1955); *but see, Chavez v. Sargent*, 329 P.2d 579 (Cal. App. 1958) (holding that local right-to-work ordinance was not preempted by federal law but was preempted by state law).

Finally, at least one federal court has interpreted the regulations implementing the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §§ 1671 *et seq.*, as prohibiting local governments from taking actions that Congress authorized states to perform. The implementing regulations of that act, 19 C.F.R. § 1970, authorized:

(a) any state agency of any state having authority under the laws of that state to exercise safety jurisdiction over interstate transmission facilities....

A gas pipeline company challenged a Louisiana parish which attempted to impose safety regulations on the construction of a pipeline. The court held that the parish could not exercise that authority but must "seek the remedy to the ills about which they complain through an appropriate state agency to insure compliance with all federal laws and regulations." *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F. Supp. 1138 (E.D. La. 1970), *aff'd*, 445 F.2d 307 (5th Cir. 1971).

These federal court decisions provide models of how creative federalism can accommodate the exercise of regulatory powers by state governments without causing regulatory chaos that would occur if local governments were also permitted to regulate areas already subject to a comprehensive scheme of federal regulation. That model

of creative federalism has worked well in the above areas and is appropriate for the regulation of pesticides.

#### IV. THE LEGISLATIVE HISTORY OF FIFRA INDICATES THAT CONGRESS INTENDED TO PREEMPT LOCAL REGULATION OF PESTICIDE USE.

The legislative history of FIFRA provides further evidence that Congress intended to preempt local governments from regulating pesticide use. It is clear from the legislative history of FIFRA that Congress believed that it was excluding local governments from having a role in the regulation of pesticide use.

The House Committee on Agriculture was the first Congressional committee to report FIFRA to the full House. That Committee *rejected* an amendment that would have permitted local governments to regulate pesticides. H.R. Rep. No. 511, 92nd Cong., 1st Sess., p. 16.

In the Senate, the Senate Committee on Agriculture and Forestry concurred with the decision of the House Committee to deprive local governments of the authority to regulate pesticide use. S. Rep. No. 92-838, 92nd Cong., 2d Sess., *reprinted in 1972 U.S. Code Cong & Admin. News*, Vol. 3, pp. 3993, 4008. The Senate Commerce Committee then reported out a bill allowing local governmental regulation of pesticides. *Id.* at 4066. When the two Senate Committee met to iron out differences in the two Committee bills, the Commerce Committee was defeated in its attempt to permit local government regulation of pesticides. *Id.* at 4091. In a full vote of the Senate, the Senate defeated an amendment to permit local governments to regulate pesticides. 118 Cong. Rec. 32258 (1972).



It is clear from the legislative history that the proponents of local preemption were victorious. However, the Petitioners' reading of the legislative history of FIFRA is like an excerpt from Alice in Wonderland. The Petitioners attempt to turn legislative defeats into judicial victories. The Petitioners argue that "the preemption proponents failed to obtain from the full Congress an express provision or other amendatory language in FIFRA's preemption section to clearly limit or qualify the authority already possessed by municipalities to act in the field." Pet. Brief at 46-47. That interpretation of the legislative history of FIFRA is fundamentally flawed. Preemption opponents did *not* fail to obtain from the full Congress an express provision on local preemption. As is clear from the legislative history, the preemption proponents understood that FIFRA would preempt local regulation of pesticides. There is nothing to indicate that proponents believed that a provision expressly limiting local governments was necessary. The proponents did not believe that any express limitation was needed and hence took no action.

Perhaps more significantly, the *opponents* of local preemption apparently had the same understanding of FIFRA. If the opponents of local preemption thought that FIFRA permitted local regulation of pesticide use, they would not have had to do anything. But they did not view FIFRA as permitting local regulation; instead, on three occasions (in the Senate Commerce Committee, in the joint Senate Committee deliberations, and in the full Senate) opponents of local preemption attempted to amend FIFRA so as to permit local regulation.

The Solicitor General's *amicus curiae* brief supporting Petitioners also takes an Alice-in-Wonderland approach to legislative history. The Solicitor points out that the

Commerce Committee in its report noted that "although the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner." Solicitor's Brief at 18 citing S. Rep. No. 970, 92nd Cong., 2d Sess. 27 (1972). According to the Solicitor's brief the "Commerce Committee *therefore* proposed, among numerous other amendments, an amendment explicitly authorizing local regulation of pesticides." *Id.* (emphasis added). Apparently, even the Solicitor recognizes that the Commerce Committee believed that such explicit authorization of local regulations was necessary in order to overcome the preemption of local governments. However, the Commerce Committee amendment was *defeated*.

The Solicitor, faced with the apparently insurmountable problem of how to turn a legislative defeat into a legislative victory, argues that the legislative defeat of the Commerce Committee amendments makes "entirely plausible" the "agreement to disagree" interpretation of the legislative history of local preemption. Solicitor's Brief at 19-20.

The interpretation of legislative history espoused by the Wisconsin Supreme Court in *Mortier* and by the district court in *Maryland Pest Control Assoc. v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987), is consistent with the plain and ordinary meaning of the words of the text of the statute, is consistent with the entire structure of the statute, and recognizes that winners in legislative battles carry more weight than losers. When an amendment is defeated, it is not an "agreement to disagree" as characterized by Petitioners but is a defeat. This Court should not

assist the Petitioners in attempting to turn that defeat into a victory by permitting the local regulation of pesticides.

### **CONCLUSION**

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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In The  
**Supreme Court of the United States**

October Term, 1990

WISCONSIN PUBLIC INTERVENOR and  
TOWN OF CASEY,

*Petitioners,*

v.

RALPH MORTIER, et al.,

*Respondents.*

On Writ Of Certiorari To The  
Supreme Court Of Wisconsin

AMICI CURIAE BRIEF OF STATES OF  
CALIFORNIA, ARIZONA, INDIANA,  
MARYLAND, NEW JERSEY AND  
WASHINGTON SUPPORTING RESPONDENTS

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**QUESTION PRESENTED**

Whether the Federal Insecticide, Fungicide and Rodenticide Act preempts local regulation of pesticide use?

## STATEMENT OF PARTIES

The amici States of California, *et al.*, adopt the Statement of Parties of the respondents.

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No. 89-1905

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AMICI CURIAE BRIEF OF STATES OF  
CALIFORNIA, ARIZONA, INDIANA,  
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**INTEREST OF AMICI CURIAE**

The amici States of California, *et al.*, have an interest in the question whether federal law authorizes local governments to regulate use of pesticides. Pesticides are vital in the production of many agricultural products, but their use creates potential risks to the human environment. The amici states have highly developed agricultural economies, and represent their citizens in matters affecting the human environment. Therefore, the amici states have an interest in the question presented here. Indeed, amici State of California has the largest agricultural economy, and also the largest number



of human resources, of any state in the nation. In the amici states' view, the Federal Insecticide, Fungicide and Rodenticide Act authorizes the states to regulate pesticide use, but precludes local governments from regulating use; the Act does not, however, preclude the states from delegating authority to local governments to administer the state's own regulatory program. This amici brief sets forth these views in greater detail for the Court's consideration.

### STATEMENT OF THE CASE

The amici states adopt the Statement of the Case contained in the respondent's brief.

### SUMMARY OF ARGUMENT

Section 24(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) specifically authorizes the states to regulate pesticide use, but does not provide similar authority to local agencies of government. In other FIFRA provisions, Congress specifically distinguished between state and local governments with respect to their respective authority under FIFRA. Congress' failure to authorize local regulation of pesticide use in section 24(a) – in light of the fact that Congress specifically distinguished between state and local authority in other provisions – indicates that Congress meant to preclude local regulation of use. This conclusion is also supported by section 24(c), which authorizes the states to register pesticides for special uses in order to serve "special local needs;" this provision indicates that Congress intended that the states would act on behalf of local police power interests and that local action itself was not authorized. The conclusion that local regulation is preempted is also supported by the legislative history of section 24(a), for the report of the congressional committee that drafted the provision stated that the provision precludes local regulation of pesticide use. Indeed, Congress rejected a proposed amendment by another congressional committee that would have specifically authorized local regulation. The congressional

purpose underlying section 24(a) was to preclude local governments from imposing excessive burdens on interstate commerce by adopting different pesticide use standards within the same state.

Although Congress precluded local governments from independently regulating pesticide use, Congress did not preempt the states from delegating authority to local governments to administer the state's own regulatory program. If the state delegates such authority, the program is a *state* program and thus is permissible under the specific language of section 24(a). The congressional purpose of precluding local governments from adopting different standards within the same state is unaffected where the state delegates authority to local governments to administer the state's own program. In the instant case, Wisconsin did not delegate specific authority to the local government to administer the State's regulatory program, and the local ordinance was not adopted pursuant to any such specific delegation of authority. Therefore, the ordinance contravenes the statutory language and congressional purposes of FIFRA and is preempted.

### ARGUMENT

#### I. THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT PREEMPTS INDEPENDENT LOCAL REGULATION OF PESTICIDE USE.

##### A. The Preemption Doctrine

In exercising its powers under Article I of the Constitution, Congress has the power, within constitutional limits, to preempt state and local laws. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 203-204 (1983). Congress may exercise its preemption authority by an explicit statement to that effect. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of an explicit statement, Congress' preemptive intent may be implied in two different ways. First, Congress may wholly "occupy the field" of the state or local regulation, thus leaving "no room" for the

adoption of supplementary state or local laws. *Rice*, 331 U.S. at 230; *Pacific Gas & Electric*, 461 U.S. at 203-204. Second, even if Congress has not occupied the field, state and local regulation may be preempted if such regulation "conflicts" with federal law, assuming that Congress has not chosen to tolerate such conflicts. *Pacific Gas & Electric*, 461 U.S. at 204; *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). Such conflicts may arise where compliance with both federal and state law is a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963), or where state or local laws stand as an "obstacle" to the accomplishment of Congress' purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This Court has established important guideposts in determining whether Congress has impliedly preempted state or local regulation. First, when Congress legislates in a field traditionally occupied by the States, the Court starts with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *California v. ARC America Corp.*, 490 U.S. \_\_\_, 109 S.Ct. 1661, 1665 (1989) (emphasis added), quoting from *Rice*, 331 U.S. at 230; see *California v. Federal Energy Regulatory Comm'n*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2024, 2029 (1990); *Florida Lime & Avocado Growers*, 373 U.S. at 142 (no preemption unless Congress "has unmistakably so ordained"); *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 414 (1973) (no preemption in absence of "clear manifestation of [congressional] intention"). As this Court has stated, there is a "presumption against finding preemption of state law in areas traditionally regulated by the States." *ARC America*, 109 S.Ct. at 1665, quoting from *Rice*, 331 U.S. at 230. "This assumption provides assurance that 'the federal-state balance [citation omitted] will not be disturbed unintentionally by Congress or unnecessarily by the Courts.'" *Jones*, 430 U.S. at 525. Additionally, this Court has held that "the regulation of health and safety matters is primarily, and historically, a

matter of local concern." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 714, 720 (1985). These guideposts are relevant here because the local ordinance in this case seeks to regulate the use of pesticides, a matter that has been traditionally regulated by state and local governments and that affects the public health and safety.

Additionally, the fact that Congress has adopted a comprehensive scheme of regulation does not, in itself, support the conclusion that Congress intends to preempt state and local regulation on the same subject. *Hillsborough County*, 471 U.S. at 718-719. "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *Hillsborough County*, 471 U.S. at 718, quoting from *Dublino*, 413 U.S. at 415. To infer preemption simply because Congress has established a comprehensive regulatory scheme "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County*, 471 U.S. at 718. The comprehensiveness of the federal scheme is even less probative where, as in this case, the local regulation relates to the public health or safety. "Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety." *Hillsborough County*, 471 U.S. at 719. Therefore, the comprehensiveness of the federal regulatory scheme in this case does not necessitate the conclusion that the local ordinance is preempted.

This Court has held that preemption of local ordinances is analyzed in the same way as preemption of state laws. *Hillsborough County*, 471 U.S. at 713-715. Still, local governments generally are not entitled to the same deference within our federal system as the states, see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978) ("Cities are not themselves sovereign; they do not receive all

the federal deference of the States that create them"),<sup>1</sup> which suggests that the presumptions against preemption apply with less force where local laws are concerned. This conclusion is particularly appropriate where, as in this case, Congress has specifically authorized state regulation and the question is whether Congress has preempted local regulation. In such cases, the states – which generally are more responsive and accountable to local interests than the federal government – are capable of acting on behalf of local interests, and thus the consequences of federal preemption on local interests are considerably less than in cases where state action itself is preempted. In such cases, the presumptions against preemption lose much of their force.

As we now explain, we believe that Congress intended to authorize regulation of pesticide use only at the national and state levels, and thus to preclude local regulation. This conclusion is supported by the statutory language of the Federal Insecticide, Fungicide and Rodenticide Act, by its legislative history, and by its underlying congressional purposes. Therefore, the local ordinance in this case impermissibly intrudes into domains reserved to the national and state governments and thus is preempted.<sup>2</sup>

<sup>1</sup> For instance, local governments do not possess the sovereign immunity held by the states under the Eleventh Amendment of the U. S. Constitution. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1974). On the other hand, local governments are equated with states for purposes of other constitutional provisions restricting state action. *Waller v. Florida*, 397 U.S. 387 (1970) (Double Jeopardy Clause); *Avery v. Midland County*, 390 U.S. 474, 480 (1968) (Fourteenth Amendment); *Trenton v. New Jersey*, 262 U.S. 182, 185-186 (1923) (Contract Clause).

<sup>2</sup> In addition to the Wisconsin Supreme Court decision under review here, the Sixth Circuit Court of Appeals and a federal district court have held that FIFRA preempts local regulation of pesticide use. *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990); *Maryland Pest Control Ass'n v. Montgomery County*, 646 F.Supp. 109 (D.Md. 1986). The California Supreme Court and the Maine Supreme

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## B. The Federal Insecticide, Fungicide and Rodenticide Act

### 1. Statutory Language

In 1947, Congress enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which in its original form provided for licensing and labeling of pesticides. 61 Stat. 163 (1947); *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 990 (1984). In response to growing public concerns about the safety of pesticides and their effect on the environment, President Nixon in 1971 proposed legislation to develop a comprehensive regulatory program governing pesticide sale and use.<sup>3</sup> Following the President's initiative, Congress in the

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Judicial Court, on the other hand, have taken the opposite view. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150 (1984); *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990).

Additionally, the Attorneys General of several states have issued opinions declaring that FIFRA preempts local regulation of pesticide use. 41 Op. Atty. Gen. Ore. 21 (1980) (Oregon); 1990 Op. Atty. Gen. Iowa 90-6-3 (1990) (Iowa); 1989 Op. Atty. Gen. Ark. 89-212 (1989) (Arkansas); 1976-77 Op. Atty. Gen. La. 324 (1978) (Louisiana); 1988 Op. Atty. Gen. Md. 88-006 (1988) (Maryland); 70 Op. Atty. Gen. Md. 161 (1985) (same).

<sup>3</sup> According to President Nixon:

"Pesticides have provided important benefits by protecting man from disease and increasing his ability to produce food and fiber. However, the use and misuse of pesticides has become one of the major concerns of all who are interested in a better environment. . . . The challenge is to institute the necessary mechanisms to prevent pesticides from harming human health and the environment. [¶] Currently, Federal controls over pesticides consist of the registration and labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act. The administrative processes contained in the law are inordinately cumbersome and time consuming, and there is no authority to deal with the actual use of

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following year adopted sweeping amendments that completely revised FIFRA, transforming the statute from a licensing and labeling law into a comprehensive regulatory scheme. 7 U.S.C. §§ 136 *et seq.*; *Ruckelhaus*, 467 U.S. at 987. The amendments provide that the Environmental Protection Agency (EPA) must register pesticides that are sold or otherwise distributed, 7 U.S.C. § 136a(a); that the EPA must classify each pesticide for general use or restricted use, *id.* at § 136a(d); that the EPA must register facilities that produce pesticides, *id.* at § 136e; and that each state may adopt a plan, subject to EPA approval, for certification of applicators of restricted use pesticides, *id.* at § 136b. The purpose of the amendments was to achieve a "more complete regulation of pesticides in order to provide for the protection of man and his environment and the enhancement of the beauty of the world around him." S. Rep. No. 92-838, 92d Cong., 2d Sess. 3 (1972).

The 1972 amendments expressly authorize the states to regulate pesticide use under specified circumstances. Under section 24(a), a "State" may regulate the sale or use of an EPA-registered pesticide, except that the state may not authorize uses prohibited by EPA. 7 U.S.C. § 136v(a). Additionally, under section 24(c), a "State" may register pesticides for additional uses within the "State" to meet "special local needs," except that the State may not register pesticides for uses denied by the EPA. *Id.* at § 136v(c). Under section 2, a "State" is defined as "a State," the District of Columbia, and certain enumerated territories. *Id.* at § 136(aa). The definition of "State" notably does not mention local agencies of government. Therefore, sections 24(a) and 24(c), on their face, authorize the *states* to regulate pesticide use under specified

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pesticides. The labels approved under the Act specify the uses to which pesticide may be put, but there is no way to insure that the label will be read or obeyed. The comprehensive strengthening of our pesticide control laws is needed." S. Rep. No. 92-970, 92d Cong., 2d Sess. 9 (1972).

circumstances, but do not authorize such regulation by local governments. The clear inference is that Congress intended to authorize regulation only at the national and state levels, not the local level. Congress apparently intended to achieve uniform national or statewide standards, and to preclude local governments from adopting different standards within the same state.<sup>4</sup>

The conclusion that local governments are not included within the definition of "State" for purposes of regulating pesticide use is strengthened by other provisions of FIFRA, some of which authorize the "State" to perform certain functions and others of which authorize both the "State" and a "political subdivision" to perform certain functions. These provisions indicate that Congress purposefully differentiated between state and local authority; thus, by authorizing only a "State" to regulate pesticide use, Congress purposefully precluded local regulation. Turning first to provisions authorizing "State" action, a "State" is authorized to develop a plan for certification of applicators of restricted use pesticides, if the plan is submitted by the "Governor of such State" and approved by the EPA. 7 U.S.C. § 136i(a)(2). Since local

<sup>4</sup> The petitioners and amicus United States argue that a local government must be a "State" for purposes of section 24(a), or otherwise section 24(b), in preempting a "State" from regulating labeling, would anomalously fail to preempt local regulation of labeling. This argument misconstrues the context of section 24. Section 24 specifically defines only the authority, and limitations thereon, of a "State" under FIFRA. The provision does not specifically define the authority, or limitations thereon, of local agencies. The limitations on local authority are not derived from the specific language of section 24, but rather from the fact that certain authority is delegated to the "State" and thus is inferentially withheld from local governments. Accordingly, the conclusion that local governments are preempted from regulating pesticide use is drawn from the fact that the "State" is specifically authorized to regulate such use and local governments are not. Similarly, section 24(b), in precluding state regulation of labeling, evinces a congressional design to occupy the field of labeling regulation, thus indicating that local labeling regulation is preempted.

governments do not have "Governors," this provision clearly indicates that the state itself must develop the plan, not local governments. Additionally, the EPA may enter into agreements with "States" that allow the "State" to implement cooperative enforcement programs; may train "State" personnel to operate such programs; and may assist "States" in implementing cooperative programs through grants-in-aid and in developing and administering "State" programs. *Id.* at § 136u(a). Each "State" has primary enforcement authority for pesticide use violations within its jurisdiction, if the EPA determines that the "State" has adequate laws regulating pesticide use. *Id.* at § 136w-1(a). The EPA is required to refer complaints of pesticide use violations to the "State" for appropriate enforcement action. *Id.* at § 136w-2(a). These provisions clearly contemplate action by the state itself, not by local governments.

In contrast to the above provisions, other FIFRA provisions specifically authorize action by *both* state and local governments. The EPA, and "any State or political subdivision" designated by the EPA, have authority to inspect books and records for possible pesticide use violations. *Id.* at § 136f(b). The EPA, "in cooperation with other Federal, State or local agencies," must establish a national plan for monitoring pesticides. *Id.* at § 136r(b). The EPA must cooperate with federal agencies and "any appropriate agency of any State or any political subdivision thereof" in administering FIFRA and in securing uniformity of regulations. *Id.* at § 136t(b).<sup>5</sup> Since

<sup>5</sup> The dissenting opinion below argued that the EPA's obligation to cooperate with local governments in achieving uniformity of regulations would be "meaningless" if local governments lacked authority to adopt regulations governing pesticide use. 452 N.W.2d at 568 (Steinmetz, J., dissenting). As noted above, however, the states have authority to register pesticides for additional uses in order to serve special local needs, 7 U.S.C. § 136v(c), and the states would presumably consult with local governments before registering pesticides for special local uses. Since local governments would normally be consulted in this process, Congress understandably sought to ensure that local governments are also consulted

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Congress specifically authorized both state and local governments to exercise such authority, Congress' failure to authorize local governments to regulate pesticide use – in a statutory provision specifically authorizing state regulation of use – demonstrates a reasonably clear congressional purpose to preclude local regulation of use.

The conclusion that Congress intended to preempt local regulation of use is supported by other statutory provisions as well. As noted above, section 24(c) authorizes a "State" to register pesticides for special uses within the "State" in order to serve "special local needs." 7 U.S.C. § 136v(c). Thus, Congress intended that the states would act on behalf of local governments with respect to pesticide uses affecting local interests. In this way, Congress accommodated the need to protect local interests and at the same time minimized the extent to which parochial local concerns will interfere with statewide uniformity of standards. It would be incongruous for Congress to authorize the states to act on behalf of local governments in authorizing pesticide uses for local needs, and on the other hand to authorize local governments to independently regulate pesticide use. Indeed, under such a scheme, local governments presumably would have authority to prohibit uses authorized by the state for "special local needs," thus creating an internal conflict within the congressional scheme. Nor can it be argued that local governments are the "State" for purposes of section 24(c), for the provision specifically differentiates between "State" authority to act and "local" interests to be protected, thus indicating a statutory dichotomy between "State" and "local" authority and interests. Thus, Congress plainly indicated that authorizations for special local uses must be made at the state level rather than

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before the EPA adopts uniform national standards. The fact that local governments must be consulted on matters that may be of importance to them does not indicate that Congress intended to authorize direct local regulation of pesticide use, particularly since Congress authorized the states to register pesticides for uses necessary to serve special local needs.



the local level, which supports the view that Congress similarly intended to authorize regulation of use at the state level rather than the local level.

Additionally, as noted earlier, section 26 authorizes each state to exercise "primary enforcement responsibility" for pesticide use violations, if the EPA determines that the state has adopted adequate laws regulating pesticide use. 7 U.S.C. § 136w-1(a). Congress thus provided a mechanism for the states to obtain federal approval of their enforcement programs, and authorized the states to assume control of enforcement if such approval is obtained. Congress did not, however, provide a similar mechanism for local governments to obtain approval of local enforcement programs, or to otherwise assume control of enforcement. Thus, Congress clearly indicated that enforcement authority must be exercised only by the EPA and the states, not by local governments. Since Congress withheld enforcement authority from local governments, it plainly withheld regulatory authority as well.

The United States argues in its amicus brief that the reference to "State" in section 24(a) necessarily includes local governments, since local governments are political subdivisions of the state. U.S. Br. 12. To be sure, local governments are political subdivisions of the state, in that the state delegates authority to them and their laws are part of the body of state law. *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285 287 (1883); *County of Los Angeles v. Riley*, 6 Cal.2d 621, 627, 59 P.2d 139, 141 (1936); *County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909 (1906); Restatement of Conflicts, § 2b. As explained above, however, other statutory provisions indicate that Congress, by authorizing only "State" regulation of pesticide use in section 24(a), and by defining a "State" as not including local governments, intended to preclude local regulation of use. Since Congress purposefully precluded local regulation, the relationship of local governments to the state government is of little relevance. Indeed, if the reference to "State" in section 24(a) were construed as including local governments, Congress apparently would have specifically authorized local governments to regulate pesticide use; in that event, the states would be unable to

preempt or otherwise restrict local regulation, because the states presumably cannot deny authority to local governments that Congress has expressly granted. Thus, the United States' argument may have the unintended consequence of restricting the states' own distribution of authority between state and local governments.

In summary, the statutory language indicates with reasonable clarity that Congress intended to achieve national or statewide uniformity of standards relating to pesticide use, and to avoid dissimilar local standards. Congress wanted a minimum of one national standard or a maximum of fifty state standards, and no more. Congress evidently believed that, because pesticide use creates problems of national and statewide significance, regulation of use should be concentrated at the national and state level. In Congress' view, the states are capable of acting on behalf of local police power interests, and thus there is no basis for authorizing regulation beyond the state level.

## 2. Legislative History

The legislative history removes any doubt that Congress intended to preempt local regulation of pesticide use. As noted earlier, President Nixon in 1971 submitted proposed legislation that became the basis of the FIFRA amendments. H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 12 (1971). The President's proposed bill included a provision authorizing both state and local regulation of pesticide use; the provision stated that "nothing in this Act shall be construed as limiting the authority of a State or political subdivision thereof to regulate the sale or use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited under authority of this Act." *Maryland Pest Control Ass'n v. Montgomery County*, 646 F.Supp. 109, 111-112 (D. Md. 1986) (emphasis added). On February 10, 1971, the President's proposed bill was introduced in the House of Representatives as H.R. 4152. H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 12 (1971). The House Agricultural Committee, after holding several hearings, reported



out a new bill, H.R. 10729. *Id.* The bill rejected President Nixon's proposed language authorizing local regulation of use, and instead contained a provision, section 24(a), that is identical to section 24(a) in its present form. *Id.* at 64. The Committee report described the provision, stating that:

"The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." *Id.* at 16.

Thus, the House Agricultural Committee bill preempted local regulation of pesticide use.

The bill was referred to the Senate Committee on Agriculture and Forestry. On June 7, 1972, the Senate Committee issued a report stating that it had "considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives." S. Rep. No. 92-838, 92d Cong., 1st Sess. 16 (1972). The report also stated that:

"Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting each such regulation would be an extreme burden on interstate commerce, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." *Id.* at 16-17.

Thus, the Senate Committee report clearly indicated that section 24 precluded local regulation of pesticide use.

The bill was then referred to the Senate Commerce Committee. That committee proposed to amend section 24 by

adding the words "or local government" after the word "State," an amendment that would have specifically authorized local regulation of pesticide use. S. Rep. No. 92-970, 92d Cong., 2d Sess. 6 (1972). The Senate Commerce Committee report described the amendment's effect, stating that:

"The amendment gives local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by States or Federal authorities. [¶] While the Agricultural Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA." *Id.* at 27.

Subsequently, the Senate Committee on Agriculture and Forestry issued a summary of comments concerning the Senate Commerce Committee's proposed amendments. In the comments, the former Committee objected to the latter Committee's proposed amendment authorizing local regulation of pesticide use, stating that:

"This [Senate Commerce Committee] amendment would permit local governments in addition to the Federal and State governments to regulate the sale or use of a pesticide. The Committee on Agriculture and Forestry felt that regulation by the Federal Government and the 50 States should be sufficient and should preempt the field." 1972 U.S. Code Cong. & Admin. News 4026. See also *id.* at 4066.

Thereafter, the Senate Agriculture and Forestry Committee and the Senate Commerce Committee conferred and drafted a compromise substitute bill that reconciled many differences between the bills, but that pointedly did not include the Commerce Committee's proposed amendment authorizing local regulation of pesticide use.

The compromise bill was then debated before the full Senate. During the debate, the Senate Commerce Committee amendment, which proposed to authorize local regulation, was submitted to and considered by the full Senate. 118 Cong. Rec. 32251, 92d Cong., 2d Sess. (1972). Senator Talmadge, Chairman of the Committee on Agriculture and Forestry, and Senator Allen, Chairman of the Subcommittee on Agricultural Research and General Legislation, offered as a substitute the language of the compromise bill adopted by those committees, which did not include the proposed amendment. *Id.* at 32251-32253, 32260. Senator Allen argued that the Senate should adopt the language of the compromise bill rather than the Commerce Committee version, stating that:

"[FIFRA] should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." *Id.* at 32256.

The Senate then rejected the Commerce Committee amendment that would have authorized local regulation of use. *Id.* at 32258. The Senate subsequently passed the compromise version of H.R. 10729. *Id.* at 32263.

Thereafter, a Conference Committee was selected to resolve differences between the Senate and House versions of the bill. The Conference Committee report did not address the specific meaning of section 24(a), see H.R. Rep. No. 92-1540, 92d Cong., 2d Sess. 30-34 (1972), apparently because the Committee understood that the provision meant exactly what its originator – the House Agricultural Committee – had said it meant, namely that local regulation is precluded. If, as contended by the petitioner, Congress did not intend to adopt the House Agricultural Committee's interpretation of its own provision, the Conference Committee necessarily would have addressed and resolved the differing interpretations. The Conference Committee's silence strongly indicates acquiescence in the House Agricultural Committee's interpretation.

In summary, Congress adopted the statutory language proposed by the House Agricultural Committee, presumably understanding, as the report of the House Agricultural Committee indicated, that the language precludes local regulation

of use. Congress specifically rejected the amendment proposed by the Senate Commerce Committee that would have had the opposite effect. As a general rule of statutory construction, the meaning ascribed to statutory language by the committee that proposes the language is entitled to substantial deference, particularly where Congress rejects proposed language that would have an opposite effect. Thus, the legislative history strengthens the conclusion that section 24(a) preempts local regulation.

The United States argues in its amicus brief that Congress remained "silent" on the issue of local preemption, and that Congress, "agree[ing] to disagree," reached a compromise under which each state is authorized to decide for itself whether to allow local regulation. U.S. Br. 9, 18-19. If Congress had reached such a compromise, the compromise would not have been unreasonable. The statutory language and legislative history, however, are devoid of any suggestion that Congress reached such a compromise. To the contrary, the statutory language, in authorizing a "State" to regulate pesticide use, is capable of only one of two meanings: Either local governments are included within the definition of "State" and thus can regulate pesticide use, or local governments are not included and thus cannot regulate. There is no room in the statutory language for the third meaning suggested by the United States, *i.e.*, that as a matter of federal law the choice belongs to the states. Moreover, the United States' argument is inconsistent with the legislative history of FIFRA, which as indicated above indicates that Congress adopted the statutory language proposed by the House Agricultural Committee that was understood to preempt local regulation. Thus, Congress did not remain silent, but instead indicated with reasonable clarity that local regulation is prohibited. As we explain later, we believe that Congress did not preclude the states from delegating authority to local governments to administer the state's own regulatory program, a conclusion that is supported both by the statutory language and congressional purposes of FIFRA. Congress did not, however, authorize the states to decline to adopt a regulatory

program and simply convey regulatory authority to local governments, as argued by the United States.<sup>6</sup>

### 3. Congressional Purpose

According to the legislative history, the congressional purpose underlying section 24(a) was to preclude local governments from imposing excessive burdens on interstate commerce, as would be the case if each unit of local government were authorized to adopt its own system of regulation. S. Rep. No. 92-838, 92d Cong., 1st Sess. 16-17 (1972) (local regulation would result in an "extreme burden on interstate commerce"). Thus, Congress was willing to tolerate some interstate commerce burdens, in that regulation might vary from state to state, but was unwilling to tolerate the excessive burdens that would result if individual cities and counties were authorized to adopt their own regulatory systems. The petitioners' argument would obstruct this congressional purpose by authorizing local governments to adopt different, potentially conflicting systems of regulation, thus creating a

<sup>6</sup> The United States relies on the analysis of the California Supreme Court in *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150 (1984), which held that Congress authorized each state to determine whether to authorize local regulation. As explained above, we believe that the *County of Mendocino* decision is not supported by the statutory language and legislative history of FIFRA. Indeed, the decision cannot be reconciled with the fact that Congress specifically adopted the statutory language proposed by the House Agricultural Committee – which stated that the language precluded local regulation – and rejected the language proposed by the Senate Commerce Committee that would have had the opposite effect. The dissenting opinion in *County of Mendocino* persuasively argued that "[s]ince the compromise bill adopted the Agricultural and Forestry Committee's version without change, ordinary principles of statutory construction suggest that the provisions should be interpreted in light of the intent expressed in that committee's report." 36 Cal.3d at 499 (Kaus, J., dissenting). We believe that the dissenting opinion is correct, although, as we explain later, we believe that Congress did not preclude the states from delegating authority to local government to administer the state's own regulatory program.

checkerboard pattern of regulation within each state. This argument would create potentially conflicting regulation with respect to agricultural or other areas that lie partially within the jurisdiction of different counties. Indeed, this argument would create conflicting regulation as to the *identical* area in some instances, as where a city – which is a form of local government – adopts different regulations than the county in which it is located. If local governments were authorized to regulate pesticide use, local governments might be able to prevent the state itself from applying pesticides to eradicate a pest infestation within the local jurisdiction, as several local governments sought to do during the 1990 Mediterranean fruit fly crisis in California;<sup>7</sup> the practical effect of such local regulation would be to allow the infestation to spread to areas outside the local jurisdiction and thus require the application of greater amounts of pesticides to eradicate the pest. Congress sought to avoid these consequences, and the resulting excessive impacts on interstate commerce, by authorizing regulation exclusively at the state level.

The United States argues in its amicus brief that regulation of use, unlike regulation of labeling, does not affect interstate commerce. U.S. Br. 22-23. To the contrary, the report of the Senate Commerce on Agriculture and Forestry stated that local regulation would cause an "extreme burden on interstate commerce." S. Rep. No. 92-838, 92d Cong., 1st Sess. 16-17 (1972). For example, the California agricultural industry extensively uses pesticides in the production of fruits and vegetables, and the California agricultural industry provides the nation with approximately one-half of the national supply of fruits and vegetables. If local governments were

<sup>7</sup> During the 1990 Mediterranean fruit fly infestation in southern California, several cities and counties adopted ordinances under state law theories that sought to preclude California from aerially spraying Malathion within the jurisdiction of the cities and counties. *California v. City of Pasadena, et al.*, No. C-755032, Superior Court for Los Angeles County; *California v. City of Fullerton*, No. 625496, Superior Court for Orange County; *California v. City of Los Angeles*, No. BS002736, Superior Court for Los Angeles County.



authorized to prohibit the use of pesticides on fruits and vegetables in California, such local regulation may reduce the amount of fruits and vegetables that could be shipped from California to other states, thus causing a substantial adverse effect on interstate commerce. Indeed, during California's 1981 Mediterranean fruit fly crisis, several states unsuccessfully sought to impose embargoes against the importation of California fruits and vegetables,<sup>8</sup> and the infestation was subsequently eliminated by aerial application of the pesticide Malathion. In short, the use of a pesticide was necessary to produce uninfested agricultural products that were widely distributed in interstate commerce. Therefore, the United States' argument that regulation of pesticide use does not affect interstate commerce is demonstrably incorrect.

The United States also argues that local regulation is consistent with the congressional purposes underlying FIFRA because local governments have the resources and capability of tailoring pesticide use to local circumstances. U.S. Br. 22-23. To the contrary, FIFRA specifically authorizes the states to register uses for "special local needs," 7 U.S.C. § 136v(c), thus indicating that the states – not local governments – are authorized to tailor pesticide use to local circumstances. The United States makes no reference to this statutory provision in its amicus brief.

## II. CONGRESS DID NOT PRECLUDE THE STATES FROM DELEGATING AUTHORITY TO LOCAL GOVERNMENTS TO ADMINISTER THE STATE'S OWN REGULATORY PROGRAM.

The fact that Congress preempted local governments from regulating pesticide use does not necessarily mean that Congress preempted the states' authority to delegate authority to local governments to administer the state's own regulatory program. As this Court has noted, "Municipal corporations

<sup>8</sup> This Court issued a temporary restraining order enjoining the embargoes. See *California v. Texas*, No. 87 Original (1980 Term); see also *California v. Texas, et al.*, No. 90 Original (1980 Term).

are instrumentalities of the State for the convenient administration of government within their limits." *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287 (1883). Accordingly, the states generally are free to delegate authority to local governments to act in furtherance of matters affecting local interests. *In re Isch*, 174 Cal. 180, 162 Pac. 1026 (1927); *City of Bakersfield v. Miller*, 64 Cal.2d 93, 410 P.2d 393 (1966); *Freeman v. Contra Costa County Water Dist.*, 18 Cal.App.3d 404, 95 Cal.Rptr. 852 (1971). We do not suggest that Congress is powerless to prohibit the states from delegating authority to local governments in instances where Congress has authorized action by the states themselves. To the contrary, if Congress has authority to preempt the states from adopting different standards, on grounds that such standards would result in unreasonable burdens on interstate commerce, *a fortiori*, Congress has authority to preempt local governments from adopting different standards within each state, on grounds that such local standards would result in even greater interstate commerce burdens. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (holding that Congress has granted antitrust immunity to states, but not to local governments on same terms). In our view, Congress can properly authorize regulation at the state level – and thus tolerate the interstate commerce impacts caused by such regulation – but preclude local regulation in order to avoid substantially greater impacts. In other words, Congress can impose reasonable conditions on its grant of regulatory authority to the states; one such condition would be that the states cannot convey their regulatory authority to local governments, since the conveyance would result in excessive interstate commerce burdens that Congress has the right to prevent. Cf. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 771-775 (1982).

To be sure, the Tenth Amendment of the U. S. Constitution, which reserves to the states powers not delegated to the federal government, may limit the extent to which Congress can permissibly restrict distribution of legislative power within the state. Cf. *National League of Cities v. Usery*, 426

U.S. 833 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In our view, the Tenth Amendment does preclude Congress from restricting such distribution of power where the state – having the right under federal law to establish its own regulatory program – establishes such a program and delegates authority to local governments to administer the program. In this situation, the state is simply providing for administration of its own program, consistently with the congressional purpose of avoiding dissimilar local regulation; the delegation of authority by the state does not cause any additional burdens on interstate commerce, and thus the balance of national and state interests weighs heavily in favor of the state delegation of authority. On the other hand, the Tenth Amendment does not, we believe, preclude Congress from restricting distribution of legislative power where the state does *not* establish its own regulatory program, and instead transfers its regulatory authority to local governments. In this situation, the program being administered is a local one, and the administration of all such local programs may result in dissimilarity of standards within each state; this result may cause potentially greater impacts on interstate commerce, and thus the balance of national and state interests tips in favor of the national interest. Therefore, although we agree with the argument of the amici States of Hawaii, *et al.*, that the Tenth Amendment imposes *some* constraints on congressional actions affecting distributions of legislative power within the state, we believe that their argument goes too far in asserting that the Tenth Amendment constrains *all* congressional actions affecting such distributions. See Am. Cur. Br. of Hawaii, *et al.*, 12. In our view, the Tenth Amendment constrains congressional action where the state delegates authority to local governments to administer the state's own regulatory program, but not where the state fails to adopt a regulatory program and instead transfers its regulatory authority to local governments.

Apart from the constitutional question, the statutory language and congressional purposes of FIFRA support the view that the states may delegate authority to local governments to administer the state's own regulatory program. If the state

delegates such administrative authority, the program administered by local authority is a "State" one and thus is permissible under the explicit language of section 24(a). As noted earlier, the congressional purpose of section 24(a) was to preclude local governments from adopting different standards within the same state; if a state delegates administrative authority to local governments, there can be no dissimilarity of local standards and thus no contravention of the congressional purpose. Because of the vast array of local resources and expertise, a state may properly decide to utilize local resources for administration purposes, consistently with the congressional goal of providing for comprehensive and effective state regulation of pesticide use. Therefore, such delegations of authority do not pose an "obstacle" to the congressional purpose, see *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and are not preempted.

To provide an example, a state may adopt a program governing pesticide use and authorize local governments to administer the program by adopting supplementary regulations and issuing permits, subject to the state's authority to review such local decisions and the state's retention of control over the program. Indeed, such a regulatory program exists in California, which has the largest agricultural industry of any state in the nation. In California, the California Department of Food and Agriculture (CDFA), through its Director, has primary responsibility for administering California's agricultural laws, including its pesticide laws. Cal. Food & Ag. Code §§ 101 *et seq.*, 14001 *et seq.* The Director has adopted extensive regulations providing for comprehensive regulation of pesticide use. 3 Cal. Code Reg. (C.C.R.) §§ 6000-6900.<sup>9</sup> The board of supervisors of each local government is authorized to hire a County Agricultural Commissioner with

<sup>9</sup> The Director's regulations provide for, *inter alia*, certification of pesticide programs, 3 C.C.R. §§ 6100 *et seq.*; inspection programs, *id.* at §§ 6140 *et seq.*; registration of pesticides, *id.* at §§ 6151 *et seq.*; permits for applicators, *id.* at §§ 6420 *et seq.*; licensing of pest control operators, *id.* at §§ 6520 *et seq.*; and prevention of pesticide groundwater contamination, *id.* at §§ 6800 *et seq.*



responsibility, *inter alia*, for local administration and enforcement of pesticide programs; the County Agricultural Commissioner, however, must be approved by the Director and is subject to the Director's oversight and review. Cal. Food & Ag. Code §§ 2101 *et seq.*, 2281. The County Agricultural Commissioner has authority to issue conditional permits authorizing pesticide use, but the permits are subject to the Director's review. *Id.* at §§ 14006.5, 14009. The County Agricultural Commissioner is authorized to adopt supplementary pesticide use regulations more restrictive than the Director's regulations, but the Commissioner's regulations are valid only if approved by the Director. *Id.* at § 11503. Thus, the Director is ultimately responsible for administration and enforcement of California's pesticide use laws, and has authority to review action by the County Agricultural Commissioner, who otherwise acts on behalf of local interests. In this way, the California program is a "State" program within the meaning of section 24(a) of FIFRA, and does not contravene the congressional purpose of precluding local governments from adopting dissimilar standards. Indeed, under the petitioner's view, local governments in California might argue that FIFRA – by authorizing local regulation of pesticide use – preempts California's authority to vest exclusive authority in the Director, a result that would diminish California's authority to provide its own distribution of regulatory authority between state and local governments.

On the other hand, the statutory language and congressional purposes of FIFRA do not support the view that the state can decline to adopt its own regulatory program and simply convey its regulatory authority to local governments. Otherwise, local governments would be able to adopt dissimilar regulatory standards, thus creating the excessive interstate commerce burdens that Congress sought to avoid. It is immaterial, with respect to the congressional purposes underlying FIFRA, that local governments may have authority under applicable principles of state law relating to distribution of power between state and local governments. The test is not whether local governments have authority under state law principles governing distribution of legislative power, or

whether the state has refrained from preempting local action. Rather, the test is whether the state has adopted a program regulating pesticide use and has delegated administrative authority to local governments. The latter test is consistent with the congressional purpose of avoiding excessive interstate commerce burdens, and the former is not. Therefore, although local governments always act pursuant to authority "delegated" by the states, in the sense that local governments have only such authority as the state delegates to them, see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 429 (1978) (Stewart, J., dissenting), Congress' goal of achieving statewide uniformity of pesticide use regulation is not consistent with all such "delegations" of authority, and is consistent only with specific delegations of administrative authority.

This Court is not unfamiliar with distinctions between local action that is authorized under specific state delegations of authority and local action that is not so authorized. For instance, this Court has held that although the states are immune from the federal antitrust laws, see *Parker v. Brown*, 317 U.S. 341 (1943), local governments do not have similar immunity unless they act "pursuant to state policy" or pursuant to state "command," or unless the state has "directed or authorized" the local action, or unless the State Legislature "contemplated" the local action, or unless the local government is "administer[ing] state regulatory policies." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413-416 (1978). If state policy is "neutral," or if the local government "express[es] its own preference, rather than that of the State," the local government lacks antitrust immunity. *Id.* at 414. Thus, local antitrust immunity depends on a qualitative analysis of the local action, in terms of whether it is specifically authorized and directed by state law. In our view, the congressional purposes underlying FIFRA require a similarly qualitative analysis of the local action.

Applying these principles to the instant controversy, the local ordinance in this case apparently was not adopted pursuant to a state system of pesticide use regulation that utilizes local governments for purposes of administration. Indeed, the



dissenting opinion below noted that the Wisconsin statute is "neutral as to what local governments may do," and argued that the local ordinance was valid simply because it did not "conflict" with state statutes and was otherwise adopted pursuant to state statutes authorizing local governments to exercise general powers of government. 452 N.W.2d at 568-569, & nn. 9-11 (Steinmetz, J., dissenting). None of the cited statutes authorizing local governmental action, however, directly related to pesticide use. *Id.* at 569 nn. 9-11. Thus, although the dissenting opinion characterized the Wisconsin statutory scheme as a "delegation" of legislative power to the local government, *id.* at 568, the "delegation" is simply a state authorization for local action in the face of state inaction. Under such a "delegation" of power, each city and county would have authority to adopt its own pesticide use regulation, thus creating the excessive interstate commerce impacts that Congress sought to avoid.

Although Congress precluded local governments from creating different intrastate standards, Congress did not preclude the state itself from adopting different standards for different areas within the state. To the contrary, section 24(c) of FIFRA specifically authorizes the state to register pesticides for specific uses necessary to serve "special local needs," 7 U.S.C. § 136v(c), which means that the state may authorize pesticide uses in some areas that are not authorized in other areas. In this way, Congress recognized that the states, in order to provide for comprehensive and effective regulation of pesticide use, must have authority to tailor pesticide use to special local circumstances. Thus, for example, the State of California might authorize certain pesticides for use in sparsely populated agricultural areas, such as parts of the Central Valley, but not for use in densely populated urban areas, such as the Los Angeles Basin. In enacting section 24(c), Congress made clear that the states have authority to make such differentiations, but made equally clear that such differentiations must be made at the state level rather than the local level. Congress thus intended that any diversity of pesticide uses within the state must be the product of state action, not local action.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the court below be affirmed.

Respectfully submitted,

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 89-1905

WISCONSIN PUBLIC INTERVENOR AND  
TOWN OF CASEY, PETITIONERS

v.

RALPH MORTIER AND  
WISCONSIN FORESTRY/RIGHTS-OF-WAY/  
TURF COALITION, RESPONDENTS

On Writ of Certiorari to the  
Supreme Court of Wisconsin

BRIEF OF AMERICAN ASSOCIATION OF  
NURSERYMEN, AMERICAN PULPWOOD  
ASSOCIATION, ASSOCIATED LANDSCAPE  
CONTRACTORS OF AMERICA, CHEMICAL  
PRODUCERS AND DISTRIBUTORS ASSOCIATION,  
INDUSTRIAL BIOTECHNOLOGY ASSOCIATION,  
INTERNATIONAL APPLE INSTITUTE,  
INTERNATIONAL SANITARY SUPPLY  
ASSOCIATION, MIDWEST FOOD PROCESSORS  
ASSOCIATION, NATIONAL AGRICULTURAL  
AVIATION ASSOCIATION, NATIONAL ARBORIST  
ASSOCIATION, NATIONAL FERTILIZER  
SOLUTIONS ASSOCIATION, NATIONAL FOREST  
PRODUCTS ASSOCIATION, ROSES, INC., AND  
SOCIETY OF AMERICAN FLORISTS AS AMICI  
CURIAE IN SUPPORT OF RESPONDENTS

### INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

The members of the *amici* organizations are involved with pesticides as producers, sellers or users.<sup>2</sup> They have a direct, immediate

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<sup>1</sup>Counsel for all parties have consented to the filing of this *amicus* brief. Their consents are on file with the Clerk of the Court.

<sup>2</sup>The American Association of Nurserymen represents 4,500 wholesale growers, garden center retailers, landscape firms and mail-order nursery businesses. The American Pulpwood Association represents the nation's pulp and paper mills, wood dealers and independent logging contractors. The Associated Landscape Contractors of America represents more than 800 landscape contracting firms. The Chemical Producers and Distributors Association comprises more than 80 companies manufacturing, formulating, distributing and selling pesticides used to protect food, feed and fiber crops, and for lawn, garden and turf care. The Industrial Biotechnology Association ("IBA") represents more than 100 small and large companies engaged in the research and development of biotechnology, including agricultural, pharmaceutical, food and environmental applications. The International Apple Institute includes 24 state and regional organizations of more than 10,000 producers who grow approximately 90% of the United States apple crop. The International Sanitary Supply Association consists of more than 3,400 companies engaged in the manufacture, formulation, distribution and sale of antimicrobial and general cleaning and

and substantial interest in whether the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7

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maintenance products, including disinfectants, sanitizers and germicides used by hospitals, nursing homes, schools, food processing plants and institutional industrial establishments. The Midwest Food Processors Association represents members packing approximately 95% of the canned and frozen vegetables and fruits produced in Illinois, Minnesota and Wisconsin annually; members also use antimicrobial products in their plants. The National Agricultural Aviation Association represents 2,031 businesses which apply seed, fertilizer and crop protection chemicals to approximately 300 million acres of farm, ranch and forest lands annually. The National Arborist Association represents the nation's tree care industry; its members use pesticides carefully to protect the nation's urban and suburban trees. The National Fertilizer Solutions Association represents retail fertilizer and agrichemical dealers. The National Forest Products Association and its affiliate, the American Forest Council, represent more than 500 forest products companies that manage forestland and produce most of the nation's lumber and board products and rely on the judicious use of pesticides to manage competing vegetation and protect forestlands from pests. Roses, Inc., represents commercial greenhouses growing more than 80% of the commercial fresh-cut roses in the United States and Canada. The Society of American Florists represents growers, wholesalers, retailers, manufacturers and suppliers of floricultural and related products.

U.S.C. Sections 136-136y (1988), preempts local government regulation of pesticide use.

It is of paramount importance to all of the *amici* and to the public for the pesticide regulatory system in the United States to emphasize uniformity and predictability. The *amici* believe that these are precisely the goals that Congress intended when it amended FIFRA in 1972.

Members of *amicus* IBA are at the cutting edge of basic research in creating new forms of pesticides through genetic engineering. The revolutionary breakthroughs which biotechnology promises to achieve can transform the very nature of agriculture in the United States and provide novel pest control products that are safe yet effective substitutes for traditional chemical

pesticides.

The *amici* are concerned that a growing number of subunits of state government continue to enact pesticide regulations and do not have the expertise or the resources to administer or enforce them properly. This is contrary to the public interest. Local regulation does not contribute additional significance to pesticide safety; it offers only the chaotic potential to misinterpret an established system of regulation. It impedes the efforts of society to maximize the production of food and fiber and the potential of the nation's forests. It imposes needless costs and confusing, duplicative regulatory burdens upon homeowners, businesses, healthcare professionals and other pesticide users. It burdens emergency efforts to eradicate widespread infestations of voracious



pests such as gypsy moths and medflies. It needlessly delays innovative research and development of alternative pest control products created through biotechnology. Local regulation is a demonstrable, Draconian inefficiency within the established coordinated Federal and State pesticide regulatory system.

#### **SUMMARY OF ARGUMENT**

The comprehensive pesticide regulatory regime which Congress created in 1972 leaves no room for local regulation. The language and structure of FIFRA and its legislative history show that Congress preempted local regulation, which it deemed duplicative, burdensome and inconsistent with the purposes of the Act.

Wellhead protection under the Safe Drinking Water Act Amendments of 1986,

Pub. L. No. 99-339, 100 Stat. 642 (1986), is a State program in which each State is given maximum flexibility to decide which responsibilities, if any, to grant to local governments and is consistent with Federal preemption of local regulation of pesticide use.

The *amici* have been and will continue to be adversely affected by a multiplicity of inconsistent and uncoordinated local pesticide use regulations. Such regulation creates confusion for those who produce, sell and use pest control products; places issues involving technical considerations at the whim of parochial political pressures; exacts unnecessary costs upon homeowners and commercial and other users; creates a patchwork of conflicting restrictions burdening commerce; and impedes local and regional efforts to control widespread

pest infestations, particularly in neighboring jurisdictions.

Finally, by frustrating research into alternative pesticides, especially nontoxic, biodegradable pesticides created through genetic engineering, local regulation moves the United States away from the goal of reducing its use of conventional pest control products.

#### ARGUMENT

##### I. FIFRA AND ITS LEGISLATIVE HISTORY SHOW THE CLEAR INTENT OF CONGRESS TO PREEMPT LOCAL REGULATION OF THE USE OF PESTICIDES.

The issue in this case is whether local government entities may enact their own legislation regulating pesticide use. It is not about delegating authority to local governments to assist in carrying out Federal and State regulatory functions. FIFRA and its legislative history show that Congress unambiguously

intended that local units of government not possess autonomy over pesticide use. Even local participation in protecting wellhead areas is consistent with this clearly expressed intention.

##### A. FIFRA's Language and Structure Show that Local Pesticide Regulation Was to Be Derived Only from Express Delegation.

This Court's recent decisions on preemption make clear that it is the intent of Congress that controls whether a federal statute has preempted state or local regulation. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). The preemption analyses of local ordinances are the same as those for statewide laws. *Id.* at 713. Under the Court's preemption decisions, Federal law or regulation can preempt State law or local ordinances through explicit Federal statutory provisions or the

structure and purpose of the Federal statute; through implication if the Federal role is pervasive and all-encompassing; or through a conflict between State and Federal law. *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). Inasmuch as "[t]he purpose of Congress is the ultimate touchstone," *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990), the Court must examine the statutory language and the structure and purpose of FIFRA to determine the purpose of Congress. *Ingersoll-Rand, supra*; *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). The inevitable conclusion is that notwithstanding the absence of explicit language specifically forbidding governments from regulating local pesticide use, Congress intended unambiguously to preempt pesticide

regulation by local governments. The analysis further shows that independent local regulation of pesticide use was not to be a part of the "comprehensive regulatory statute" enacted in 1972, *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 991 (1984). That statute, the Federal Environmental Pesticide Control Act of 1972 ("FEPCA"), Pub. L. No. 92-516, 86 Stat. 973, created a "coordinated Federal-State administrative system to control the application of pesticides"<sup>3</sup>; the unnecessary intrusion of myriad local government units independent of Federal and State control and bereft of the means to undertake the complex scientific evaluations necessary to make reasoned regulatory decisions would frustrate that

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<sup>3</sup>See H.R. REP. No. 511, 92d Cong., 1st Sess. 1 (1971); 117 CONG. REC. 40,067 (1971) (statement of Rep. Mizell).



system. It is thus without merit to assume that Congress intended to empower more than 83,000 local units of government<sup>4</sup> to impose multiple levels of regulation in addition to those of the Federal government and the States.

Section 24 of FIFRA, 7 U.S.C. Section 136v, grants limited authority to the States to regulate pesticides<sup>5</sup>, but expressly preempts State labeling and packaging and grants no authority to local jurisdictions. Subsection (a) provides that States can regulate the

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<sup>4</sup>See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 271-72 (110th ed.).

<sup>5</sup>Although subsection 24(c) authorizes the States to register additional uses of federally registered pesticides to meet "special local needs," the Administrator of the Environmental Protection Agency ("EPA") may suspend that authority if a State's controls are inadequate to "assure that State registration under this section will be in accord with the purposes of this Act . . . ."

sale or use of pesticides "but only if and to the extent that the regulation does not permit any sale or use prohibited by this Act." Subsection (b) provides that States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act."<sup>6</sup> Congress has conferred primary

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<sup>6</sup>"Labeling" is defined in subsection 2(p)(2), 7 U.S.C. Section 136(p)(2). Congress enacted subsection 24(b) to ensure uniform nationwide labeling and packaging of pesticides. In its 1988 amendments to FIFRA, Congress added the heading "Uniformity" to subsection 24(b) without changing the text. Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, Section 801(m)(2), 102 Stat. 2654, 2682 (1988). Accordingly, all State and local government regulation of pesticide labels, labeling and packaging, including but not limited to warnings, precautionary statements, directions for use and other EPA-required matter, is expressly preempted by FIFRA. Even the Report of the Senate Committee on Commerce states that under the Committee's proposed amendments to Section 24, "Subsection (b) preempts any State or local government labeling or packaging requirements differing from such requirements under the Act." S. REP. No. 970, 92d Cong., 2d Sess.

enforcement responsibility for pesticide use violations upon the States, but only if the EPA Administrator determines that they can perform this responsibility; and such authority may be rescinded if a State program is deemed to be inadequate. Sections 26, 27; 7 U.S.C. Sections 136w-1, 136w-2. The Administrator may authorize States to issue Experimental Use Permits pursuant to EPA-approved centralized State plans subject to "such terms and conditions as [the Administrator] may by regulations prescribe," and certify pesticide applicators pursuant to EPA-approved

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44 (1972).

The decision of the Supreme Court of Wisconsin does not implicate the preemption of labeling or packaging in subsection 24(b), but focuses exclusively on whether local governments can regulate pesticide use under subsection 24(a). Thus the scope of subsection 24(b) is not at issue in this case.

centralized State plans. Sections 5(f), 11(a)(2), 7 U.S.C. Sections 136c(f), 136i(a)(2). State agencies may also petition the Administrator for exemptions to FIFRA to deal with emergency conditions. Section 18, 7 U.S.C. Section 136p.

The definition of "State" in Section 2(aa) of FIFRA, 7 U.S.C. Section 136(aa), does not expressly include local government units.<sup>7</sup> Petitioners devote a

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<sup>7</sup>Federal environmental statutes which provide for independent local regulation frequently contain definitions of "municipality" separate from those of "State," define the word "person" to include political subdivisions, or do both. See, e.g., Clean Air Act, 42 U.S.C. Sections 7602(e), (f) ("municipality," "person"); Clean Water Act, 33 U.S.C. Sections 1362(4), (5) ("municipality," "person"); Safe Drinking Water Act, 42 U.S.C. Sections 300f(10), (12) ("municipality," "person"); Resource Conservation and Recovery Act, 42 U.S.C. Section 6903(9), (13), (15) ("intermunicipal agency," "municipality," "person"); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601(21) ("person"); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. Section 11049(7)

substantial portion of their Brief to supporting the dissenting opinion of Justice Steinmetz below that failure to read local governments into the definition of States achieves the anomalous result of permitting independent local regulation of pesticide labeling and packaging. See Brief for Petitioners at 30-31 & n.5, 33-40, 154 Wis. 2d at 48, 452 N.W.2d at 568. This argument only suggests that local governments, being mere creatures of the State, have no greater authority than the State itself. It does not follow, then, that in areas where the States themselves may regulate, local regulation perforce is permitted. If Congress intended the term "State" specifically to include political subdivisions in addition to its

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("person").

usual meaning, Congress could easily have been explicit.<sup>8</sup>

Contrary to the dissents below (154 Wis. 2d at 35-36, 48, 452 N.W.2d at 562-63, 568) and the Brief for Petitioners at 16-18, 30-39, 99 n.34, 102, those rare instances in which FIFRA mentions political subdivisions do not confer regulatory authority upon them. Section 8(b), 7 U.S.C. Section 136f(b), deals with inspections of records "upon request of any officer or employee of the Environmental Protection Agency or of any State or political subdivision, *duly designated by the Administrator . . .*," such inspections to be made "[f]or the

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<sup>8</sup>Compare the definition of "State" in 29 U.S.C. Section 1002(10) (similar to FIFRA) with 29 U.S.C. Section 1144(c)(2) ("State" includes "any political subdivisions thereof, or any agency or instrumentality of either . . ."). Indeed, this Court's own rules regarding *amicus* briefs distinguish between States and their political subdivisions. See SUP. CR. R. 37.5.



purposes of enforcing the provisions of this Act." (emphasis added). Nonetheless, in Section 9(a), 7 U.S.C. Section 136g(a), which provides for the inspection of establishments, the reference to officers or employees is limited to those of EPA "or of any State." It is thus apparent that even in such a routine matter as inspection authority, Congress distinguished between States and their political subdivisions.<sup>9</sup>

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<sup>9</sup>The reference to Section 23(a), 7 U.S.C. Section 136u(a), in the concurring opinion in *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 936-37 (6th Cir. 1990), petition for cert. pending, No. 90-382, and the Brief of the Solicitor General at 5, 12, is not inconsistent with this conclusion. Section 23(a)(1) authorizes the Administrator of EPA to enter into cooperative agreements with States to "delegate to any State . . . the authority to cooperate in the enforcement of this Act through the use of its personnel or facilities, to train personnel of the State . . . to cooperate in the enforcement of this Act, and to assist States . . . in implementing cooperative enforcement programs through grants-in-aid;" (emphasis added). Although nothing in Section 23(a) precludes a State from designating personnel or

The National Pesticide Monitoring Plan referred to in Sections 20(b) and (c), 7 U.S.C. Section 136r(b) and (c), makes clear that the National Pesticide Monitoring Plan and pesticide monitoring are EPA activities which are to be carried out "in cooperation with other Federal, State, or local agencies." Section 6(g)(1), 7 U.S.C. Section 136d(g)(1), merely requires notification to the Administrator and "appropriate State and local officials" of the

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facilities of local governments to participate in enforcing FIFRA, it strains the language of this provision to conclude that "States" here also includes local governments merely because Section 8(b) expressly confers upon the Administrator the power to *designate* local officials to inspect records to enforce FIFRA.

The limitation in Section 23(a) to "States" is also significant because any State that enters into a cooperative agreement with EPA for the enforcement of pesticide use restrictions is granted primary enforcement responsibility for pesticide use violations. See FIFRA Section 26(b), 7 U.S.C. Section 136w-1(b).

possession of a cancelled or suspended pesticide, the quantity possessed and the place where it is stored. It grants no independent authority to local officials nor does it impose any responsibilities upon them. The language of FIFRA makes clear that local officers or employees inspect records only as deputies of EPA. Local governments are limited to assisting EPA in carrying out certain of its duties; they are not authorized to exercise their own regulatory authority.

Finally, the dissenting opinion of Justice Abrahamson and the Briefs for Petitioners and the Solicitor General make much of the language in Section 22(b), 7 U.S.C. Section 136t(b), which requires the EPA Administrator to cooperate with "any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions

of this Act, and in securing uniformity of regulations." Petitioners construe the last phrase in this very general section of the Act as negating all contrary legislative indicators and contradicting the structure of FIFRA by "contemplat[ing] there would be authority in municipalities to adopt pesticide regulations . . . ." Brief for Petitioner at 32.

Petitioners read far too much into this language. They would have the Court believe that uniformity is best achieved multilaterally. This is, very simply, an overstatement of the intent of Congress. It is also illogical. Even the Solicitor General's Brief did not argue that local jurisdictions should have regulatory autonomy. That Brief stated:

Some [environmental problems] may more appropriately be addressed by a regulatory

system characterized by a set of basic federal standards that States may supplement, either by their own regulations or by local regulations adopted within the framework of appropriate state delegation.

Brief for the United States as *Amicus Curiae* at 22 (emphasis added).

Moreover, the legislative history of FIFRA is unanimous in stating that the purpose of this provision is to "provide[] for cooperation by the Administrator with other Federal agencies and with agencies of State and local government *in carrying out the Act.*" H.R. REP. NO. 511, *supra*, at 28 (1971); S. REP. NO. 838, 92d Cong., 2d Sess. 29; S. REP. NO. 970, *supra*, at 43. (emphasis added).

Even if the issue of local regulation was as contentious as Petitioners assert, it is fanciful to conclude that Congress either granted or reserved through the

back door of Section 22(b) any autonomy to local governments to regulate pesticide use.

FIFRA thus provides powerful evidence that Congress intended only a derivative role for local governments in pesticide regulation. Preemption of local governments from enacting their own regulation of pesticide use is the only construction of FIFRA that is faithful to the intent of Congress to create a comprehensive system of primary Federal and coordinated supplementary State regulation.

**B. The Legislative History of FIFRA Confirms the Intent of Congress to Exclude Local Governments from Independent Pesticide Regulation.**

The legislative history of FEPCA confirms what the language of FIFRA already shows: Congress never intended to permit pesticide regulation by local



governments.

Certain conclusions from the legislative history are apparent. The House Committee on Agriculture assumed that "the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions," effectively precluding independent local regulation. See H.R. REP. NO. 511, *supra*, at 16. The Senate Committee on Agriculture and Forestry added express preemptive language to its Report. S. REP. NO. 838, *supra*, at 16. Efforts by the Senate Committee on Commerce to place amendments explicitly permitting local government regulation were rejected.

The Senate Committee on Commerce concluded that without an explicit reference to local governments, their power could be preempted under the

measure reported by the Senate Committee on Agriculture and Forestry and the language contained in its Report. The Report of the Committee on Commerce noted:

While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA.

S. REP. NO. 970, *supra*, at 27 (emphasis added).

Further, the Committee on Commerce's specific analysis of its amendments to

Subsection 24(a) states:

This section specifies the authorities retained by the States and local governments under the Act. Generally, the intent of the provisions is to leave to the States and local governments the authority to impose stricter regulations on pesticide use than that required under the Act.

*Id.* at 44 (emphasis added).

Notwithstanding the concerns expressed by the Committee on Commerce, the Senate Committee on Agriculture and Forestry filed a Supplemental Report which stated its opposition to the amendments of the Committee on Commerce and twice reiterated that any local pesticide regulation should be totally preempted. See S. REP. NO. 838, Part II, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4026, 4066.

From August 1, 1972, to September 22, 1972, the staffs of the two Senate

Committees hammered out an amendment in the nature of a substitute. This substitute, with changes agreed to in Conference (none of which involved local regulation) became FEPCA. The Supplemental Report of the Committee on Agriculture and Forestry stated that the substitute, which was supported by all of the members of that Committee and most of the members of the Committee on Commerce, "met essentially all of the objections raised in this report." *Id.*, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS at 4088. The Explanation of the Compromise Substitute stated that the substitute "has been prepared resolving all of the differences." 118 CONG. REC. 32,257 (1972). The Explanation further stated pointedly that "Commerce Committee amendments . . . [including amendment] 10

(authority of local governments to regulate the use of pesticides) . . . are not included in the substitute." *Id.* at 32,258.

When H.R. 10729 was taken up on the Floor of the Senate, the amendments of the Committee on Commerce were introduced, including Amendment 10. *Id.* at 32,249-51. Thereafter, Senator Allen asked for and received unanimous consent that "notwithstanding the fact that the committee [on Commerce] amendments have not been agreed to, it be in order to offer a complete substitute for the whole bill; and that if the substitute should be agreed to all of the committee amendments be considered as having been withdrawn." *Id.* at 32,252. The explanation of H.R. 10729 that appeared in the Report of the Committee on Agriculture and Forestry and the

Explanation of the Compromise Substitute were ordered printed in the Congressional Record. *Id.* at 32,252, 32,257. All of the Senators who participated in the debate lauded the substitute, and none noted the absence of the amendments authorizing local regulation. The Senate then approved the substitute unanimously. *Id.* at 32,263.

As the majority opinion below and the opinion in *Maryland Pest Control Association v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd without opinion*, 822 F.2d 55 (4th Cir. 1987) demonstrate, the intent of Congress could hardly have been more apparent. All concerned assumed that failure to include local governments deprived them of regulatory authority. This was not an instance where a compromise papered over disagreements. The parties did not



"agree[] to disagree," as stated in the dissent by Justice Abrahamson below, 154 Wis. 2d at 43, 452 N.W.2d at 565, and the majority in *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 492-93, 683 P.2d 1150, 1160-61, 204 Cal. Rptr. 897, 907-08 (1984).<sup>10</sup> The position of the Committee on Agriculture and Forestry clearly prevailed over that of the Committee on Commerce, and no dissent

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<sup>10</sup>Within weeks after the decision of the Supreme Court of California in *County of Mendocino*, the California Legislature enacted a statute overruling it. Accordingly, regulation of pesticide registration, sale, transportation or use was declared to be of "statewide concern," and "[e]xcept as otherwise specifically provided in this code, no ordinance or regulation of local government, including, but not limited to, an action by a local governmental agency or department, a county board of supervisors or a city council, or a local regulation adopted by the use of an initiative measure, may prohibit or in any way attempt to regulate any matter relating to the registration, sale, transportation, or use of economic poisons, and any of these ordinances, laws, or regulations are void and of no force or effect." Cal. Food & Ag. Code Section 11501.1(a) (West 1986).

was raised on the Senate Floor. The House likewise was in accord.

The legislative history of FEPCA thus reinforces the conclusion that Congress intended to create a comprehensive and coordinated system involving only the Federal government and the States to regulate the use of pesticides, and that a separate role for local governments was expressly considered and unequivocally rejected. It is impossible to believe that in the face of this intensive Congressional attention to the role of local governments, which resulted in the merely derivative functions Congress provided them in FIFRA, the absence of explicit preemption language would result in myriad local jurisdictions having independent, conflicting and overlapping authority over this very difficult and

contentious regulatory activity.

## II. FIFRA IMPLIEDLY PREEMPTS LOCAL REGULATION OF PESTICIDE USE.

It is noteworthy that in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the Federal statute contained "no express provision of preemption" of local regulation.<sup>11</sup> *Id.* at 633. Yet "[i]t is the pervasive nature of the scheme of Federal regulation" that led the Court to conclude that preemption was implied. *Id.*

### A. The Coordinated Federal-State Regulatory System Covers the Field to the Exclusion of Local Regulations.

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<sup>11</sup>Although the Senate version of the Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (1972) contained an express preemption section, the statute as enacted did not. Instead, the Court relied on statements of the Chairman of the House Committee on Interstate and Foreign Commerce and a member of the Senate Committee on Public Works on the Floor of their respective chambers and the message of the President on signing the final bill. *Id.* at 636-38.

In this case, Congress adopted a "comprehensive regulatory statute," *Ruckelshaus v. Monsanto Company, supra*, and expressly incorporated a role for State regulation. It can fairly be said that FIFRA's coordinated pesticide regulatory scheme is pervasive. Just as the Federal system enacted for control of aircraft noise left no room for local curfews or other local controls, *City of Burbank, supra*, at 638, regulation of pesticide use likewise is subject to "an elaborate and detailed system of controls." *Id.* at 634 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)). The express language of FIFRA contemplates a pervasive system of primary Federal regulation coordinated with supplementary centralized State controls, and this comprehensive system

occupies the field.<sup>12</sup> It is not logical that FIFRA contemplates, atop coordinated Federal and State regulation, the prospect of local units of government such as the Town of Casey creating schemes for controlling pesticide use that may be more extensive than their telephone directories. As the Senate Committee on Agriculture and Forestry recognized, the authority to regulate must be commensurate with the ability to regulate. See S. REP. NO. 838, *supra*, at 16.

*Amici* Milford, Michigan; Mayfield Village, Ohio; and Boulder, Colorado do not recognize this fundamental

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<sup>12</sup>EPA's only published interpretation, permitting local assistance with a State applicator certification program only if it is "uniform throughout the State and is totally responsive to State direction," is in complete accord. See 40 Fed. Reg. 11,700 (Mar. 12, 1975).

proposition. Their Brief contends that if this Court finds that Congress impliedly preempted local governments, then preemption should be in those areas where the Federal and State governments must act. Thus they argue:

Given the cost and complexity of such determinations, only a small portion of local pesticide laws, such as local bans on the use of particular pesticides or local permitting decisions that have the same effect, revisit these determinations, and thus only those laws would be preempted on the ground that they enter this field or conflict with federal regulation.

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Under these rationales, local governments would be precluded from making registration decisions--the core activity of EPA under FIFRA. Thus, local laws that ban or restrict the use of certain pesticides would be preempted, although local governments could still impose limitations in their proprietary or contracting capacity on pesticide use on public lands, in public



buildings or pursuant to local government contracts.

Brief at 27, 28.

Under their rationale, requirements for a permit for application to private lands, submission of detailed technical information and hearings are tantamount to registration decisions. These requirements are at the heart of Ordinance 85-1, and because they duplicate the "core activity of EPA under FIFRA", would be preempted.

**B. Local Pesticide Regulation Is Unnecessary for Protection of Wellhead Areas Under the Safe Water Drinking Act.**

Petitioners and the Solicitor General make much of the purported ability of local governments to exercise discretion in enacting specific pesticide controls from the Safe Drinking Water Amendments of 1986, Public Law No. 99-339 (1986). Petitioners devote a

considerable portion of their Brief to the wellhead protection program in 42 U.S.C. Section 300h-7(a). Brief for Petitioners at 77-87. However, Section 300h-7 makes clear that local governments were not intended to have an independent role in wellhead protection. Section 300h-7(a) provides:

The Governor or the Governor's designee of each State shall, within three years [of June 19, 1986], adopt and submit to the Administrator a State program to protect wellhead areas within their jurisdiction . . . Each State program under this section shall, at a minimum--

(1) specify the duties of State agencies, local governmental entities and public water supply systems with respect to the development and implementation of programs required by this section.

The remaining provisions of Section 300h-7 make it clear that the planning and implementation are to be conducted on a

state-wide basis. Local government agencies in the wellhead protection program are not given independent authority<sup>13</sup>; their powers are derived from the role which the State may specify. Indeed, the Conference Report on the Safe Drinking Water Act Amendments is very clear that each State may adopt a unique method of protecting wellhead areas:

Each State has the responsibility of determining how best to describe a program to protect the water supply within each protection area in the State. The provision is structured to afford States maximum flexibility in formulating a protection strategy. A State is not required to develop a regulatory program unless it chooses to do so . . . .

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<sup>13</sup>It should be noted that the Safe Drinking Water Act has a definition of "municipality" that is separate from that of "State." See n.7, *supra*.

States can be expected to take a wide variety of approaches to protection of wellhead areas within their jurisdiction, and it is conceivable that each State could develop its own unique approach. Protection strategies may also vary for different protection areas within one State. The amendment recognizes that States are best able to assess specific problems within their jurisdictions, and to develop and implement necessary protection measures.

H.R. REP. NO. 575, 99th Cong., 2d Sess. 45 (1986).

A state has "maximum flexibility" in choosing a role for local governments in wellhead protection. In some instances a state may choose to confer expansive authority on local governments; in others, a state may choose to exclude their participation altogether. Pesticide regulatory autonomy is thus unnecessary for local agencies to fulfill any wellhead protection functions

conferred by the State.

### **III. LOCAL PESTICIDE REGULATION IS CONTRARY TO THE PUBLIC INTEREST.**

The Town of Casey and its Ordinance 85-1 provide a classic example of the problems inherent in autonomous regulation of pesticide use by local governments and the prescience of the Report of the Senate Committee on Agriculture and Forestry. As a remote rural town of fewer than 500 tucked away in the northwest corner of Wisconsin, Casey lacks the financial resources and the technical expertise necessary to make informed scientific decisions to enforce its extensive pesticide regulatory ordinance. Even such matters as the control and measurement of pesticide drift call for specialized training and expertise which the Town does not possess.

Neither the Wisconsin Legislature nor any State agency expressly authorized the Town of Casey to enact Ordinance 85-1 or any of its predecessors. Nonetheless, under Ordinance 85-1 the Town could reject any pesticide use permitted under FIFRA and by Wisconsin even where the use would be limited to private lands. Indeed, the permit which the Town granted Respondent Mortier banned aerial spraying and limited the land over which he could spray.

#### **A. Local Pesticide Regulation Involves Economic and Social Costs That Can Harm the Quality of Life.**

Ordinance 85-1 adopts a definition of pesticide even broader than that set forth in FIFRA.<sup>14</sup> It also defines

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<sup>14</sup>Section 1.1(2) of Ordinance 85-1 not only codifies FIFRA's definition but also includes State law and regulations (II Pet. App. at C5-6).



"public lands" to include all lands and interests in lands "owned by the state [and] the County of Washburn . . . and which are dedicated in whole or in part to public use and benefit." Section 1.1(4) (II Pet. App. at C6).

The scope of FIFRA is very broad. It obviously includes pest control agents used in agriculture and forestry. However, a walk through the aisles of any supermarket reveals that common kitchen and bathroom cleansers (e.g., Comet® and Vanish®), household disinfectants (e.g., Lysol®) and laundry bleaches (e.g., Clorox®) fall within FIFRA's scope. Pesticides also have very important institutional uses; restaurants, hospitals, offices of healthcare professionals, barbershops and beauty salons, food processing plants and other commercial establishments and structures

would be much less sanitary, and consequently more dangerous places, without them. Indeed, the flea and tick collars that pets wear are also pesticides.

Although Ordinance 85-1 is limited to spraying pesticides on land, the use of all of the products set forth above could be subject to bans, restrictions or permit requirements if localities were left to their own devices. Indeed, nothing but their imagination would prevent local governments from requiring notices or other restrictions if individuals sprayed for household insects, applied a disinfectant in bathrooms, dusted roses in their gardens, or protected themselves by putting disinfectant chemicals in their swimming pools. Pesticide producers, distributors and users such as the members of the

*amici* organizations, and individual homeowners, businesses and consumers can be confronted with the daunting challenge of complying simultaneously with Federal and State regulations and those adopted by counties, cities, towns and special local districts asserting jurisdiction even over the same parcel of land or structure requiring pest control services.

Local pesticide regulation has interfered, and can continue to interfere, with the use of pest control products to increase the abundance of crops and yields from forests, protect home values, maintain home food service and health care sanitation and protect trees and home surroundings.

Thus a by-law and regulation of the Town of Wendell, Massachusetts and its Board of Health, respectively, adopted

certain restrictions similar to Ordinance 85-1; some would have been extended to agricultural and domestic uses.<sup>13</sup> An ordinance enacted by the Village of Wauconda, Illinois, regulated a variety of commercial pesticide applications, including control of mosquitoes, household insects and lawn care. Users of pesticides, including landlords and tenants of public buildings, were required to register with the village, obtain a permit and pay an annual fee. The ordinance required users to post outdoor warning signs or indoor warning decals of specified size and message for

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<sup>13</sup>The Supreme Judicial Court of Massachusetts upheld the Attorney General's disapproval of the ordinance and by-law on state preemption grounds. *Town of Wendell v. Attorney General*, 394 Mass. 518, 476 N.E.2d 585 (1985).

72 hours after application.<sup>16</sup>

Ordinance 85-1 and others like it have a serious impact on the ability of railroads and utilities to maintain their rights-of-way and forest managers to maximize yields by protecting trees from insects and competing vegetation. This is the case with an ordinance of the Town of Lebanon, Maine, which prohibits any commercial spraying of herbicides for nonagricultural uses unless the spraying is first approved by a vote of the town meeting.<sup>17</sup>

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<sup>16</sup>See *Pesticide Public Policy Foundation v. Village of Wauconda*, 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd without opinion*, 826 F.2d 1068 (7th Cir. 1987); *Pesticide Public Policy Foundation v. Village of Wauconda*, 117 Ill. 2d 107, 510 N.E.2d 858 (1987) (answering certified question that ordinance was preempted by Illinois law).

<sup>17</sup>The town meeting refused the request of an electric power company to spray to control the growth of vegetation along the utility's right-of-way. The Supreme Judicial Court of Maine rejected a FIFRA preemption challenge to the ordinance. *Central Maine Power Co. v. Town of*

Typically, rights of way and forests cut across many local jurisdictions. Even though applications of pesticides are conducted in full compliance with Federal and State law, local regulation of these activities can result in requiring a single maintenance job to comply with literally dozens of local regulations. This not only increases the cost to perform these activities (with concomitant increases in freight rates and the price of forest products), but imposes significant delays and burdens on adjoining municipalities as well. The definition of "public lands" in Ordinance 85-1 as including lands owned by the State and Washburn County can reduce the ability of the State or County to eradicate predators such as gypsy moths.

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*Lebanon*, 571 A.2d 1189 (Me. 1990).



By having to comply with the onerous provisions of Section 1.3 of the Ordinance (II Pet. App. at C7-16), wait a minimum of 60 days and potentially be subject to public hearings, the State or County would be hard pressed to make timely applications to deal with emergency pest infestations in areas in and around the Town of Casey. To the extent that unincorporated areas or other political subdivisions do not have such ordinances, those areas would be subject to greater infestation or would require more intensive and intrusive application of pesticides than otherwise necessary.

When southern California suffered an infestation of medflies in late 1989, the State proposed to use pesticides to eradicate the problem, just as it had done successfully earlier. This time, however, the cities of Los Angeles and

Fullerton enacted ordinances forbidding agricultural operations from their respective airports and banning aerial application of pesticides within their respective city limits.<sup>18</sup> The cities of Pasadena, Azusa and Lynwood adopted ordinances purporting to regulate formation flying within their boundaries, an action which would inhibit the State's ability to apply pesticides.<sup>19</sup> Except for the Azusa ordinance, which has expired, and notwithstanding California's express preemption of local pesticide regulation,<sup>20</sup> these ordinances remain in

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<sup>18</sup>See *State of California v. City of Los Angeles*, No. BS002736 (Super. Ct. Los Angeles County filed Aug. 29, 1990); *State of California v. City of Fullerton*, No. 625496 (Super. Ct. Orange County filed May 22, 1990).

<sup>19</sup>See *State of California v. City of Pasadena*, No. C755032 (Super. Ct. Los Angeles County filed Mar. 12, 1990).

<sup>20</sup>See n.10, *supra*, at 30.

effect.<sup>21</sup> Efforts by local governments to circumvent even the most explicit State legislation aimed at precluding local regulation underscores the inadequacy of relying solely upon State preemption of local authority.

This parochialization of pesticide regulation and resulting restrictions on pesticide use are unnecessary restraints upon the regulated localities and their neighbors. They burden commerce, inhibit responses to emergencies and increase the costs and complexities of compliance. Such consequences provide cogent reasons why Congress intended to prohibit local regulation of pesticide use in 1972.

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<sup>21</sup>The cities of Los Angeles, Glendale, Burbank and San Bernardino also filed suit against the State alleging that aerial pesticide spraying, even if consistent with FIFRA, constituted a public nuisance. See *Medfly Consolidated Cases*, Judicial Council Coordination Proceeding No. 2487 (Super. Ct. Los Angeles County consolidated Aug. 22, 1990).

## **B. Local Efforts at Pesticide Regulation Have Impeded Research into Alternatives to Conventional Pesticides.**

Many of the members of *amicus* IBA are engaged in research into alternatives to traditional chemical pesticides using the techniques of genetic engineering. EPA has promulgated an integrated framework for regulating biotechnology under FIFRA<sup>22</sup> which enables EPA to become involved in regulating research into genetically engineered and nonindigenous pesticide candidates far earlier than with conventional pesticides. Nonetheless various local governments have succumbed to concerns about biotechnology by adopting ordinances which prohibit or seriously delay the ability of

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<sup>22</sup>See EPA, Statement of Policy; Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act, 51 Fed. Reg. 23,313-36 (June 26, 1986).

researchers to conduct necessary environmental releases with Federal and State approval.

Two examples will show the way in which such ordinances can stifle research. First, in Monterey County, California, the Board of Supervisors passed two interim ordinances (February 18, 1986, and March 28, 1986) temporarily prohibiting experimental field tests using genetically altered bacteria, and adopted a final ordinance on May 12, 1987. The final ordinance<sup>23</sup> required a use permit, the submission of detailed information, including all information submitted to State and Federal agencies not considered to be trade secrets, and called for environmental review pursuant to the California Environmental Quality

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<sup>23</sup>Monterey County, Cal. Ordinance 3233 (1987) (Monterey County Code Ch. 20.110).

Act, financial assurances and indemnification to the County and its employees. Violations each day were considered to be separate offenses punishable by a fine of up to \$500, imprisonment for up to 180 days, or both. Permits could be issued with such conditions as the County Planning Commission deemed necessary to protect public health, safety and the environment. The final ordinance stated:

The purpose of this Chapter is to establish a uniform County regulatory policy, standards, and permitting process pertaining to the location and siting of experiments involving the release of genetically engineered microorganisms into the environment with the end in view that public health and safety and the environment are afforded the maximum degree of protection. It is not the intent of this Chapter to enter the regulatory sphere occupied by the federal and state government; rather, it is the intent of this Chapter to more



fully carry out County land use authority embodied in County land use plans and zoning ordinances by using them as primary guides in the determination of proper location for the conduct of genetic engineering experiments.<sup>24</sup>

Notwithstanding EPA's approval of an Experimental Use Permit for a small-scale field test of a genetically engineered pesticide candidate, and the State of California's own Experimental Use Permit approval, the County of Monterey determined, by Ordinance No. 3233, that it was uniquely well suited to regulate the location and siting of experiments involving the release of genetically engineered microorganisms. By doing so in the guise of a land-use ordinance to regulate a matter that was categorically preempted by Federal and State law,

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<sup>24</sup>MONTEREY COUNTY, CAL. CODE Section 20.110.020 (1987).

biotechnology research has effectively been shut down in Monterey County. Noting this consequence, the Monterey County Agricultural Commissioner wrote to the County's Board of Supervisors:

The perceived political climate has affected testing of Bacillus thuringiensis products in Monterey County. Because these products would be of great benefit to locally produced crops, they must be tested here to assure efficacy and safety under local growing conditions. Because of the Genetic Engineering Experiments Ordinance, such testing is not being done in Monterey County.

Monterey County is known as the salad bowl of the world, but is in danger of losing this title by not allowing vital experimentation with biologically sound alternatives to the toxic pesticides currently being used to control various pests. Experimentation in the actual growing region is an essential step preceding registration of new products.

(emphasis in the original).<sup>25</sup>

The Monterey County ordinance is still in effect.

Second, efforts to impose restrictions on the environmental release of genetically engineered organisms have been unsuccessful in the New Jersey Legislature. Nonetheless, the City of Estell Manor and Shamong Township have adopted ordinances which severely restrict and delay such research.<sup>26</sup>

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<sup>25</sup>Memorandum from Richard Nutter to the Monterey County Board of Supervisors (June 21, 1988), reprinted in the Appendix to this Brief.

<sup>26</sup>Shamong Township Ordinance 1988-1 requires any researcher proposing to release a genetically engineered microorganism, inter alia, to apply for a permit and pay a \$1,000 processing fee at least six months before the release, have not less than \$5 million in liability insurance and prepare a detailed risk assessment and a contingency plan to deal with potential environmental damage. The release would be permitted only after the Township Council approves it after a public hearing. Violators are punishable by fines and imprisonment, and the municipal attorney may seek injunctive relief. See N.Y. Times, March 20, 1988, Section 12 (N.J.

Clearly, Congress did not intend that local units of government would be able to inveigh against a comprehensive regulatory scheme by manipulating zoning laws or passing other legislation to grind research to a screeching halt. Such a Draconian effect demonstrates the folly of autonomous Balkanization of regulatory authority that Petitioners support so zealously. The Court need not speculate about the prospective impact of local pesticide regulation: it need only look to Monterey County to confirm its

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Weekly), at 4, col. 5. Estell Manor Ordinance No. 87-8 (1987) requires a permit issued after a public hearing. The City's governing body is empowered to adopt regulations similar in nature to those in the Shamong ordinance. Violators are also subject to fines and imprisonment. Both ordinances are still in effect. To the extent these ordinances regulate release of genetically engineered pesticides or pesticide candidates, they have not been approved by the New Jersey Department of Environmental Protection as required by state law. See N.J. STAT. ANN. Section 13:1F-13 (1985), enacted in 1971.

effects.

If agricultural biotechnology is to achieve its promise to contribute to restoring the competitive position of the United States and to create products that will replace traditional chemical pesticides, it is necessary to eliminate the potential for local legislation responding to fear and ignorance which can overwhelm carefully controlled research efforts approved by Federal and State authorities. A decision by this Court holding that FIFRA preempts such local regulation will go a long way in permitting this vital research to proceed in a timely fashion.

# CONCLUSION

For the foregoing reasons, the Judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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March 27, 1991



APPENDIX

MEMORANDUM

AGRICULTURAL COMMISSIONER  
COUNTY OF MONTEREY

JUNE 21, 1988

TO: MONTEREY COUNTY BOARD OF  
SUPERVISORS

FROM: RICHARD NUTTER, AGRICULTURAL  
COMMISSIONER

SUBJECT: GENETIC ENGINEERING EXPERIMENTS  
ORDINANCE

In May of 1987 your Board adopted the Genetic Engineering Experiments Ordinance. Since that time, there have been no applications to perform experimental work with genetically altered organisms.

No research authorizations for experiments with genetically altered microbial organisms have been submitted to Monterey County during the past year.

Two companies, Mycogen Corporation and Ecogen, have indicated concerns regarding performing research with any type of microbial organism in Monterey County.

Mycogen Corp. indicated that it has avoided work in Monterey County because it is an "unknown political environment" and there is no desire to create controversy regarding their products. This company has performed experimental work with Bacillus thuringiensis and with

a fungus that kills a common weed, cheese weed. This work has been done in Fresno and San Diego Counties.

Another company, Ecogen, has experimented with Bacillus thuringiensis crosses on lettuce and broccoli in Santa Barbara and Fresno Counties. Advanced Genetic Sciences has obtained a research authorization for experimentation with naturally occurring Pseudomonas bacteria on celery, cauliflower, and cotton in Contra Costa, Fresno, Tulare, and Kern Counties.

The perceived political climate has affected testing of Bacillus thuringiensis products in Monterey County. Because these products would be of great benefit to locally produced crops, they must be tested here to assure efficacy and safety under local growing conditions. Because of the Genetic Engineering Experiments Ordinance, such testing is not being done in Monterey County.

Monterey County is known as the salad bowl of the world, but is in danger of losing this title by not allowing vital experimentation with biologically sound alternatives to the toxic pesticides currently being used to control various pests. Experimentation in the actual growing region is an essential step preceding registration of new products.

For the sake of growers in this county, as well as those consuming such commodities, there should not be this additional step for performing research

with genetically altered microbials. There are adequate protections through existing federal, state, and county regulatory systems.

I recommend that the Genetic Engineering Experiments Ordinance not be continued as a part of the Monterey County zoning ordinance. It is unnecessary and cumbersome and is to our disadvantage.

RWN/SEC: sec